

Applicant Details

First Name	Katherine											
Middle Initial	R.											
Last Name	Ryan											
Citizenship Status	U. S. Citizen											
Email Address	kryan7@uchicago.edu											
Address	<table><tbody><tr><td>Address</td></tr><tr><td>Street</td></tr><tr><td>6106 South University Avenue, APT 411</td></tr><tr><td>City</td></tr><tr><td>Chicago</td></tr><tr><td>State/Territory</td></tr><tr><td>Illinois</td></tr><tr><td>Zip</td></tr><tr><td>60637</td></tr><tr><td>Country</td></tr><tr><td>United States</td></tr></tbody></table>	Address	Street	6106 South University Avenue, APT 411	City	Chicago	State/Territory	Illinois	Zip	60637	Country	United States
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Zip												
60637												
Country												
United States												
Contact Phone Number	6314958685											

Applicant Education

BA/BS From	State University of New York-Binghamton
Date of BA/BS	May 2019
JD/LLB From	The University of Chicago Law School
	https://www.law.uchicago.edu/
Date of JD/LLB	June 4, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Managing Editor, Chicago Journal of International Law
Moot Court Experience	Yes
Moot Court Name(s)	Board Member, Hinton Moot Court

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Lewis, Sheri
shl@uchicago.edu
773-702-9614

Wood, Diane
diane_wood@ca7.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Katherine Ryan
6106 S. University Avenue
Apartment 411
Chicago, I.L. 60637
631.495.8685

June 8, 2023

The Honorable Juan R. Sánchez
U.S. District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, P.A. 19106

Dear Chief Judge Sánchez:

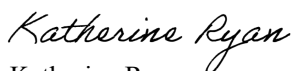
I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024 term. I am particularly interested in clerking for you because of your commitment to serving the public and those who are less fortunate. During my adolescence, I was very involved in my local church's outreach to New York City's homeless population. I also spent time in Nicaragua, building homes for impoverished families in rural areas. Now in law school, I plan to engage in more pro bono work. I will be spending the second half of my summer volunteering at the British Institute of International and Comparative Law, where I will be providing free legal research for human rights organizations. When I return to Chicago, I intend to volunteer for the Exoneration Project.

I also have close friends and family in the Philadelphia area, and would welcome the opportunity to apply my analytical, research, and writing skills to the work of the Eastern District of Pennsylvania. I developed my analytical skills in both professional and academic settings. Before law school, I worked as a financial controls auditor, first in the private sector and later at the Federal Reserve. In that position, I conducted extensive research and analysis related to internal data, and benchmarked that data against relevant federal regulations to assign audit scores and write audit reports. My legal education has further developed these skills, and I have put them into practice as a litigation intern at the U.S. Department of Justice and as a summer associate at Latham and Watkins in Washington, D.C.

I also have strong research and writing skills. Throughout law school, I have researched statutes, regulations, and common law to draft memoranda and mock appellate briefs. Given my performance during my first year of law school, I was invited to serve as a Legal Writing Fellow and join *The George Washington University Law Review*. After transferring to the University of Chicago, I continued to refine those skills as the Managing Editor of *The Chicago Journal of International Law*. While serving in that role I produced my student comment, which will be published later this year.

A resume, transcript, writing sample, and letters of recommendation from Judge Diane Wood and Professor Sheri Lewis are enclosed. The University of Chicago has not posted all grades for the spring quarter, but I will provide an updated transcript when they do so. Should you require additional information, please do not hesitate to contact me.

Sincerely,


Katherine Ryan

Katherine Ryan

6106 S. University Avenue Apartment 411, Chicago, IL 60637 | kryan7@uchicago.edu | 631.495.8685

EDUCATION

The University of Chicago Law School

Juris Doctor Candidate

Chicago, IL

Expected June 2024

- Honors: Latham and Watkins Scholars Program, White Collar Defense and Investigations
- Activities: Managing Editor, *Chicago Journal of International Law* | Moot Court Board | First Generation Professionals

The George Washington University Law School

Juris Doctor Candidate

Washington, DC

August 2021 - May 2022

Cumulative GPA: 3.81

- Honors: George Washington Scholar (top 1-15% of class)
- Activities: Law and Economics Society | Law Association of Women Legal | Writing Fellows program

Binghamton University, State University of New York

Bachelor of Science in Accounting, summa cum laude

Binghamton, NY

August 2015 - May 2019

Cumulative GPA: 3.97

- Honors: Dean's List | The President's Circle of Excellence | PwC Scholar | BU Scholar
- Activities: Resident Assistant | Tour Guide | Business Calculus Tutor | Study Abroad, Maynooth University of Ireland

PUBLICATIONS

Brexit Backslide: How the United Kingdom's Break from the European Union Could Erode Female Labor Rights

The Chicago Journal of International Law

Upcoming, Volume 24

- Analyzed the impact of E.U. law on U.K. labor rights to illustrate the consequences of the recent Revocation and Reform Bill

WORK EXPERIENCE

Latham and Watkins

Summer Associate

Washington, DC

May 2023 - Present

- Conduct legal research and draft memoranda about sanctions, foreign investment, and income tax to aid attorneys and clients
- Attend client meetings, practice area information sessions, and firm events to better understand client-facing legal work
- Invited to the White Collar Defense and Investigations Scholars Program for academic achievement and practice area interest

The Department of Justice, Civil Division

Aviation, Space, and Admiralty Litigation Summer Intern

Washington, DC

May 2022 - August 2022

- Conducted legal research and drafted memoranda about the Federal Tort Claims Act to aid attorneys as they prepare for trial
- Attended depositions, meetings with expert witnesses, and pre-trial hearings to better understand the litigation process
- Received the J.B. and Maurice C. Shapiro Public Service Grant for summer funding from the George Washington University

The Federal Reserve, Office of the Inspector General

Financial Management and Internal Controls Auditor

Washington, DC

December 2020 - August 2021

- Performed industry research, stakeholder interviews, fieldwork testing, and report writing for audits of the FRB and CFPB
- Analyzed performance metrics to determine if the FRB and CFPB had made tangible improvements related to past audits
- Engaged with employees across the Federal Reserve as a member of Toastmasters and the Female Employee Resource Group

RSM US, LLP

Process Risk and Controls Consulting Associate

New York, NY

July 2019 - December 2020

- Verified the accountability of government institutions and financial entities through internal audits and SOX 404(b) testing
- Utilized accounting software tools such as Auditor Assistant, Collaborate, and Adobe to push projects to timely completion
- Regularly interacted with female and intergenerational employees through involvement in employee networking groups

VOLUNTEER EXPERIENCE

British Institute of International and Comparative Law

Human Rights Summer Fellow

London, U.K.

Incoming, August 2023

- Will serve as a research assistant for BIICL fellows to aid their work on retained E.U. law reform in the United Kingdom

Lazarus Rising

Volunteer

Binghamton, NY

January 2016 - May 2019

- Met one-on-one with multiple homeless Binghamton residents to assist their successful entry into the workforce
- Critiqued resumes and offered mock interviews to better prepare individuals for upcoming meetings with potential employers
- Maintained lasting relationships via email and phone calls to offer continued advice on professional betterment

INTERESTS AND SKILLS

Interests: Finance, running (10Ks and half marathons), bike riding, reading (historical fiction and biographies), cooking

Skills: Legal research and writing, interpretation of financial statements, SOX 404(b) auditing, CRP and first aid certified

THE UNIVERSITY OF
CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Katherine R Ryan
Student ID: 12376444

Scott C. Campbell, University Registrar

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2022
Program Status: Active in Program
J.D. in Law

External Education

State University of New York at Binghamton
Binghamton, New York
Bachelor of Science 2019

Spring 2023

Course	Description	Attempted	Earned	Grade
LAWS 40501	Constitutional Law V: Freedom of Religion	3	0	
LAWS 42801	Antitrust Law	3	3	175
LAWS 43251	Advanced Legal Writing	2	2	177
LAWS 53101	Legal Profession: Ethics	3	3	179
LAWS 94130	The Chicago Journal of International Law	1	1	P

Designation:

Anthony Casey

Send To:

Katherine Ryan
6106 S University Ave Apt 411
Chicago, IL
60637-5700

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Beginning of Law School Record

Autumn 2022

Course	Description	Attempted	Earned	Grade
LAWS 41601	Evidence	3	3	180
LAWS 42301	Business Organizations	3	3	177
LAWS 48215	Modern American Legal History	3	3	183
Req	Meets Writing Project Requirement			
Designation:	William J Novak			
LAWS 53264	Advanced Legal Research	2	2	182
	Sheri Lewis			

Winter 2023

Course	Description	Attempted	Earned	Grade
LAWS 41101	Federal Courts	3	3	177
LAWS 53201	Corporate Criminal Prosecutions and Investigations	3	3	179
LAWS 59903	Judicial Federalism	3	0	
LAWS 94130	The Chicago Journal of International Law	2	2	P
	Anthony Casey			

Honors/Awards

The University of Chicago Business Law Review, Staff Member 2022-23

End of University of Chicago Law School

Date Issued: 06/11/2023

Page 1 of 1

KEY TO TRANSCRIPT ON FINAL PAGE

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF
CHICAGOKey to Transcripts
of
Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit <http://cs.uchicago.edu/policies/disclosures>.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades		
Grade	College & Graduate	Business Law
A+	4.0	4.33
A	4.0	4.0
A-	3.7	3.67
B+	3.3	3.33
B	3.0	3.0
B-	2.7	2.67
C+	2.3	2.33
C	2.0	2.0
C-	1.7	1.67
D+	1.3	1.33
D	1	1
F	0	0

Non-Quality Grades

- I** **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade following the mark I, (e.g. IA or IB).
- IP** **Pass (non-Law):** Mark of I changed to P (Pass). See 8 for Law IP notation.
- NGR** **No Grade Reported:** No final grade submitted.
- P** **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
- Q** **Query:** No final grade submitted (College only).
- R** **Registered:** Registered to audit the course.
- S** **Satisfactory**
- U** **Unsatisfactory**
- UW** **Unofficial Withdrawal**
- W** **Withdrawal:** Does not affect GPA calculation.
- WP** **Withdrawal Passing:** Does not affect GPA calculation.
- WF** **Withdrawal Failing:** Does not affect GPA calculation.
- Blank:** If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

- H** Honors Quality
- ps** High Pass
- P** Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a

University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled *Pro Forma* does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(B)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

Revised 09/2016

A PHOTOCOPY OF THIS DOCUMENT IS NOT OFFICIAL

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G36193931
 Date of Birth: 06-FEB

Date Issued: 10-JUL-2022

Record of: Katherine R Ryan

Page: 1

Student Level: Law
 Admit Term: Fall 2021

Issued To: KATHERINE RYAN
 KRYAN7@GWU.EDU

REFNUM:78706102

Current College(s): Law School
 Current Major(s): Law

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
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GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2021

Law School

Law

LAW 6202	Contracts	4.00	A-	
	Swaine			
LAW 6206	Torts	4.00	A	
	Turley			
LAW 6212	Civil Procedure	4.00	A-	
	Colby			
LAW 6216	Fundamentals Of	3.00	A	
	Lawyering I			
	McDonough			
Ehrs	15.00 GPA-Hrs	15.00	GPA	3.822
CUM	15.00 GPA-Hrs	15.00	GPA	3.822
GEORGE WASHINGTON SCHOLAR				
TOP 1%-15% OF THE CLASS TO DATE				

Spring 2022

Law School

Law

LAW 6208	Property	4.00	A-	
	Kieff			
LAW 6209	Legislation And	3.00	A	
	Regulation			
	Schwartz			
LAW 6210	Criminal Law	3.00	A	
	Weisburd			
LAW 6214	Constitutional Law I	3.00	B+	
	Chen			
LAW 6217	Fundamentals Of	3.00	A	
	Lawyering II			
	McDonough			
Ehrs	16.00 GPA-Hrs	16.00	GPA	3.792
CUM	31.00 GPA-Hrs	31.00	GPA	3.806
Good Standing				
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT				
GEORGE WASHINGTON SCHOLAR				
TOP 1%-15% OF THE CLASS TO DATE				

Fall 2022

Law School

Law

LAW 6250	Corporations On	4.00	-----	
LAW 6360	Criminal Procedure	3.00	-----	
LAW 6471	Patent Law	3.00	-----	
LAW 6472	Copyright Law	3.00	-----	
LAW 6647	Alternative Dispute	2.00	-----	
	Resolution			
Credits In Progress: 15.00				

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
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***** TRANSCRIPT TOTALS *****
 Earned Hrs GPA Hrs Points GPA

TOTAL INSTITUTION 31.00 31.00 118.00 3.806

OVERALL 31.00 31.00 118.00 3.806

***** END OF DOCUMENT *****



E. J. McManis
 University Registrar

This transcript processed and delivered by Parchment

Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and

School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit <http://gw.gwu.edu/corcorantranscriptkey>

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-, Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C-, C- grades on the graduate level.

Law Grading System

A+, A-, Excellent; B+, B-, Good; C+, C-, C-, Passing; D, Minimum Pass; F, Failure; CR, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN, Conditional; W, Withdrawal; X, Exempt; CNP, Conditional converted to Pass; CNF, Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the final grade.

For historical information not included in the transcript key, please visit

<http://www.gwu.edu/transcriptkey>

This Academic Transcript from The George Washington University located in Washington, DC is being provided to you by Parchment, Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Parchment, Inc. is acting on behalf of The George Washington University in facilitating the delivery of academic transcripts from The George Washington University to other colleges, universities and third parties.

This secure transcript has been delivered electronically by Parchment, Inc. in a Portable Document Format (PDF) file. Please be aware that this layout may be slightly different in look than The George Washington University's printed/mailed copy, however it will contain the identical academic information. Depending on the school and your capabilities, we also can deliver this file as an XML document or an EDI document. Any questions regarding the validity of the information you are receiving should be directed to: Office of the Registrar, The George Washington University, Tel: (202) 994-4900.

Sheri H. Lewis
Director of the D'Angelo Law Library
D'Angelo Law Library
1121 East 60th Street | Chicago, IL 60637
phone: 773-702-9614 | fax: 773-702-2889
e-mail: shl@uchicago.edu

June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Katherine Ryan for a clerkship with you. Katherine is an outstanding student with a curious and analytical mind. It has been a pleasure to work with her at UChicago. I am sure that she would be an excellent law clerk.

I first met Katherine when she was in my Advanced Legal Research (ALR) course in the autumn 2022 quarter. ALR is a seminar class at the University of Chicago; it is limited to twenty-five students with an enrollment preference for third-year students. The course attracts self-motivated students interested in developing practical skills, particularly improving their effectiveness and efficiency as legal researchers. Katherine was one of a few second-years in last year's course.

Katherine was a terrific student, and her work was exceptional throughout the quarter. Her final paper was particularly noteworthy. Instead of an exam, students submit a comprehensive research paper on a selected legal topic. To complete the assignment, students thoroughly research a legal area or issue, analyze their findings at every step, and document their results and recommendations in a written product. Katherine's paper addressed the application of the "full and equal enjoyment" provision in Title III of the Americans with Disabilities Act. It was a well-written paper, excellent in its analysis, and among the best submitted in the course. I am impressed when a student's paper goes beyond the research parameters of their project and considers the real-world implications of a legal issue. Katherine's paper was unique in that regard.

I also have had an opportunity to get to know Katherine outside of class; she is delightful and has an impressive legal mind. Katherine is hard-working and a self-starter who takes the initiative and seeks guidance to ensure her understanding of an issue is sound and that her work on it is accurate and thorough. Katherine also is pleasant, courteous, and sincere, and I believe she would be a valuable and welcome member of your chambers' staff.

Based on my knowledge of her intelligence, research skill, and personal qualities, I strongly recommend Katherine for a law clerk position in your Court.

Very truly yours,
Sheri H. Lewis

Sheri Lewis - shl@uchicago.edu - 773-702-9614

Diane P. Wood
Senior Lecturer in Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am pleased to write this letter of recommendation for Katherine Ryan, who was a student in my Judicial Federalism seminar during the Winter Quarter of 2023 at the University of Chicago Law School. My observation of both her oral and written contributions to the seminar convince me that Katherine will make an outstanding law clerk.

The seminar was designed to explore the many ways in which we make federalism work in the courts. It begins with a look at the original decision in the Constitution to allow Congress to decide whether to have a full-blown system of federal courts. We then go on to consider jurisdictional doctrines, allocation devices such as the Rooker-Feldman doctrine, inter-system full faith and credit, abstention doctrines, and anti-injunction statutes. From there, we turn to substantive rules, primarily the Erie doctrine and the section 2254 version of habeas corpus. Last, we look at other systems, including state courts, tribal courts, and the courts of the European Union, to see what insight they provide.

Katherine's particular interest is in the last of those topics: how does the EU operate with a severely limited number of EU-level courts (just the Court of Justice, the General Court, and a couple of specialized tribunals), and how does it rely instead on the courts of the Member States to enforce EU law? Central to its system is a sort of reverse certification, pursuant to which a Member State court may (and sometimes must) ask the Court of Justice to answer a particular question of EU law. Katherine's upcoming fellowship at the British Institute of International and Comparative Law, where she will be working on the unraveling of the UK's now-terminated membership in the European Union, will touch on all these questions.

This is the topic Katherine has been exploring in her paper for the seminar. While the paper is not complete yet, I have seen enough of her work and have had enough discussions with her about it to know that it will be an excellent contribution to this literature. Most importantly, this comparative perspective allows one to take a fresh look at the policy choices we in the United States have made. With more clarity about our goals and mechanisms, we can take the right steps to achieve them more effectively.

I should add finally that Katherine brings a sophisticated knowledge of the financial world to her work. Her B.S. in Accounting, summa cum laude, will be of great help in a clerkship as she tackles securities issues, corporate law, various kinds of financial frauds, bankruptcy, and other such cases. She is also no stranger to litigation, having spent the summer of 2022 as an intern at the Civil Division of the U.S. Department of Justice, in its aviation, space, and admiralty section. In short, she has already accumulated a wide range of expertise that would be of great value in anyone's chambers. She is also someone who is widely liked and admired by her peers. She accomplished the transition from George Washington University Law School to the University of Chicago Law School without missing a beat; she quickly became the Managing Editor of the Chicago Journal of International Law. It is often hard for transfer students to become involved immediately in journals, moot court, and similar activities, but Katherine did it.

Please let me know if I may be of any further assistance. As I said at the outset, Katherine has my enthusiastic recommendation.

Yours truly,

Diane P. Wood

Diane Wood - diane_wood@ca7.uscourts.gov

TO: Cyrus Branch

FROM: Fall Associate 1131

RE: Books & Brews Salem LLC – Failure to Accommodate Concern

QUESTIONS PRESENTED

1. Under the ADA, is Jayde Ramirez’s dog Sasha a service animal when she has been trained to bark in a way that interrupts the anxiety attacks that Ramirez experiences due to PTSD?
2. Under the ADA, did the Black Cat Magic Café discriminate against Ramirez when they failed to modify their procedures to accommodate Sasha at their beer and music festival?

BRIEF ANSWERS

1. Likely yes. Under the ADA, a service animal is any dog individually trained to perform a specific task that directly benefits an individual with a disability. A task directly benefits an individual with a disability if it ameliorates a symptom of their disability and is performed in response to a specific trigger. In this case, Sasha’s barking interrupts the anxiety attacks that Ramirez experiences as a symptom of her PTSD. This barking is performed in response to triggers that manifest during the anxiety attacks. Therefore, Sasha is likely a service animal.
2. Likely yes. Under the ADA, a place of public accommodation discriminates against an individual with a disability when it fails to make reasonable modifications that are necessary to accommodate them. A modification is necessary when existing practices fail to provide full and equal enjoyment. To determine if a modification is reasonable, courts assess its associated costs, administrative burdens, and threats to health and safety. Here, Ramirez’s requests were intended to modify practices that prevented her from enjoying entertainment and amenities offered to non-disabled patrons. These modifications were inexpensive,

unlikely to disrupt festival operations, and would not threaten the health or safety of others.

Therefore, the Black Cat Magic Café likely discriminated against Ramirez.

STATEMENT OF FACTS

Books & Brews Salem LLC is the parent company of Black Cat Magic Café (the Café), a pop-up venue located in Salem, Oregon. R. at 8. During a beer and music festival at the Café, Jayde Ramirez (Ramirez) and her dog Sasha tried to enter the event tent but were turned away by the host, Ronald Betts (Betts), and manager, Emma Yousuf (Yousuf). *Id.* at 2.

Ramirez suffers from PTSD. *Id.* at 1. Her disability causes her to experience debilitating anxiety attacks. *Id.* Approximately one year ago, Ramirez adopted Sasha, a 140-pound Newfoundland, from the Can Go Dogs Training School. *Id.* at 11. At the time of her adoption, Sasha had been trained to recognize when her human partner was experiencing anxiety and would loudly and repeatedly bark in response to that recognition. *Id.* at 10. After adopting Sasha, Ramirez continued to train her to perform this task. *Id.* at 1. Sasha's barking helps Ramirez identify and avoid the stressful situations that cause her anxiety attacks. *Id.* According to Ramirez, Sasha is healthy and has no history of biting or aggressive behavior. *Id.* at 2.

On the day of the festival, all tables inside the venue were occupied when Ramirez and Sasha arrived, except for one directly next to a food truck. Transcript at 1. Ramirez requested to be seated at that table, but Betts refused, noting that Sasha might trip the servers, jump on the food, or create a mess that the festival's limited staff did not have the capacity to clean. *Id.* Betts offered the picnic tables outside the tent, but Ramirez declined, noting that she would not be able to view the river, stage, or sunset. *Id.*

After requesting to speak to Yousuf, Ramirez asked to sit on the grassy area in front of the festival stage. *Id.* at 2. Yousuf accepted this proposal, but noted that food would not be served there, and once the show began Ramirez would have to leave. *Id.* Ramirez declined and suggested that Betts move other guests to the open table in front of the food truck so that she could be seated away from it. *Id.* Betts denied this request, alleging that Sasha was “banging into people,” and “licking things.” *Id.* During these interactions, Betts also noted that Sasha was “gigantic, disgusting,” and getting “drool and hair everywhere.” *Id.* at 1. Regardless of this, adults and children gathered to pet her. *R.* at 13.

Betts then requested Sasha’s paperwork, claimed that Ramirez was lying about her disability, and pointed to a paraplegic patron wearing a Marine Corps t-shirt to illustrate that, “only true heroes deserve special treatment.” Transcript at 2. Sasha began to bark very loudly, and Betts requested that Ramirez remove her from the premises. *Id.* at 3. One patron who was petting Sasha voiced his objection to this request. *R.* at 13. While some were distracted from the event by Sasha’s barking, no complaints were voiced. *Id.* at 1-13; Transcript at 1-3.

According to Ramirez, the sight of the paraplegic patron triggered an anxiety attack that caused her to leave the venue. *R.* at 2. One week later, Ramirez wrote a letter to the Café in which she alleged that they violated her rights as a disabled person, demanded payment of \$50,000 within 30 days, and threatened to sue the Café if they failed to comply. *Id.* at 1.

DISCUSSION

- I. SASHA IS LIKELY A SERVICE ANIMAL BECAUSE SHE PERFORMS A SPECIFIC TASK THAT DIRECTLY BENEFITS AN INDIVIDUAL WITH A DISABILITY, AND THE CAFÉ LIKELY DISCRIMINATED AGAINST RAMIREZ BECAUSE THEY REFUSED TO MAKE REASONABLE MODIFICATIONS THAT WERE NECESSARY TO ACCOMMODATE HER.**

Under Title III of the ADA, no individual shall be discriminated against due to disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. 42 U.S.C. § 12182. To establish a claim for failure to accommodate under Title III, a plaintiff must show that, “(1) [s]he is disabled as defined by the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) the defendant employed a discriminatory policy or practice; and (4) the defendant discriminated against the plaintiff based on the plaintiff’s disability by (i) failing to make a requested reasonable modification that was (ii) necessary to accommodate the plaintiff’s disability.” *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004).

It is undisputed that Ramirez is disabled per the ADA, the Café is a private entity that operates a place of public accommodation, and a discriminatory practice was employed. R. at 1-13; Transcript at 1-3. Thus, to successfully bring a failure to accommodate claim against the Café, Ramirez must demonstrate that they discriminated against her by refusing to make a requested reasonable modification that was necessary to accommodate her disability. *Fortyune*, 364 F.3d at 1081. Furthermore, because Ramirez has alleged that Sasha is her service animal, this memorandum will address the validity of that claim. R. at 1.

Part A discusses why Sasha is likely a service animal because she has been trained to perform a specific task that directly benefits Ramirez’s disability. Part B discusses why the Café likely discriminated against Ramirez by failing to make requested modifications that were (i) necessary, and (ii) reasonable.

A. Sasha Is Likely a Service Animal Because She Has Been Trained to Perform a Specific Task That Directly Benefits Ramirez’s Disability.

Under the ADA, a service animal is any dog individually trained to perform a specific task that directly benefits an individual with a disability. 28 C.F.R. § 36.104 (2021); *C.L. v. Del Amo Hosp., Inc.*, 992 F.3d 901, 910 (9th Cir. 2021). To promote equitable access and advance the goals of the ADA, the Ninth Circuit has held that a service animal's training may be conducted by their owner and does not require formal certification. *Id.*

A task directly benefits an individual's disability if its performance ameliorates a symptom of their disability. *Davis v. Ma*, 848 F. Supp. 2d 1105, 1116 (C.D. Cal. 2012). A task ameliorates a symptom if it interrupts or prevents its occurrence, and can be accomplished by barking, jumping, pawing, or licking. *See K.D. v. Villa Grove Cmty. Unit Sch. Dist. No. 302 Bd. of Educ.*, 936 N.E.2d 690, 692 (Ill. App. Ct. 2010) (affirming that a dog trained to bark during the night if its owner, a young boy with autism, left his bed ameliorated a symptom of his autism because it allowed his parents to interrupt his inadvertent attempts to run away); *Sadler v. Fred Meyer Stores, Inc.*, U.S. Dist. LEXIS 172562 (D. Or. 2018) (stating that a dog trained to jump on, paw at, and lick its owner, a woman who suffered from extreme anxiety, when she was having an anxiety attack ameliorated her symptoms because it prevented escalation by reminding her to calm down). While the trained task can be an ordinary behavior expected of a dog, such as barking or licking, it should be unique in that it is performed in response to triggers related to the owner's disability. *See C.L.*, 992 F.3d at 911 (stating that a hypothetical dog trained to sit in its owner's lap in a particular position ceased to engage in the ordinary behavior of a dog because it strictly sat that way in response to triggers related to the owner's disability).

In the present case, as in *C.L.*, the fact that Sasha's training was conducted by Ramirez and is not substantiated by formal certification is irrelevant. R. at 1. Instead, a court would consider whether Sasha's barking ameliorates the anxiety attacks that Ramirez experiences as a

symptom of PTSD by interrupting or preventing their occurrence. As in *K.D.*, where the court found that a service dog's barking ameliorated a symptom of a boy's autism by interrupting his inadvertent attempts to run away during the night, Sasha's barking ameliorates a symptom of Ramirez's PTSD by reminding her to leave the stressful situations that cause her anxiety attacks. *Id.* While Sasha's barking may seem less extensive than the jumping, pawing, and licking performed by the dog in *Sadler*, the purpose of these tasks was to prevent the owner's anxiety from escalating by reminding her to calm down, just as the purpose of Sasha's barking is to prevent Ramirez's anxiety from worsening by reminding her to leave stressful situations. *Id.*

Another relevant consideration is whether Sasha's barking is performed in response to triggers related to Ramirez's disability. As in *C.L.*, where the court noted that a hypothetical dog that was trained to sit in its owner's lap in a particular position ceased to engage in ordinary behavior because it strictly sat that way in response to triggers related to its owner's disability, Sasha's barking exceeds behavior that dogs naturally engage in because it is consistently performed in response to triggers related to Ramirez's anxiety attacks. *Id.* at 11. This is supported by the fact that Sasha only began barking after Betts pointed to a paraplegic veteran, which corresponds with the moment that Ramirez allegedly began suffering from an anxiety attack. *Id.* at 2; Transcript at 3.

Because Sasha is trained to bark in a way that ameliorates Ramirez's anxiety attacks and performs this task in response to triggers related to these attacks, she is likely a service animal.

B. The Café Likely Discriminated Against Ramirez Because They Failed to Make Requested Modifications That Were Necessary and Reasonable.

As previously noted, to establish that the Café discriminated against her on the basis of disability, Ramirez must show that they failed to make requested modifications that were both

reasonable and necessary. Subpart (i) will discuss why the modifications requested were necessary, and subpart (ii) will discuss why they were reasonable.

i. The modifications requested were necessary because the Café’s existing practices failed to provide Ramirez with full and equal enjoyment of their facilities.

A requested modification is necessary to accommodate a disabled individual if current practices fail to provide them with full and equal enjoyment of a public accommodation’s facilities. *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1132 (9th Cir. 2012); 42 U.S.C. § 12182. Full and equal enjoyment guarantees more than mere access; it requires that disabled and non-disabled individuals be provided functionally equivalent experiences. *Celano v. Marriott Int’l, Inc.*, 242 F.R.D. 2, 38 (N.D. Cal. 2008). To determine if an experience is functionally equivalent, courts examine the experience from the point of view of non-disabled parties and assess whether a like experience is provided to their disabled counterparts. *See Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1137 (9th Cir. 2003) (finding that a movie theater failed to provide a functionally equivalent experience when non-disabled patrons had a variety of comfortable viewing locations to choose from while wheelchair users had to sit in the theater’s first row and uncomfortably crane their necks to view the screen).

An experience will not be considered “like” if it is a mere substitute that fails to provide benefits inherent to visiting the facility. *See Antoninetti v. Chipotle Mexican Grill, Inc.*, 614 F.3d 971, 979 (9th Cir. 2010) (holding that Chipotle’s burrito assembly process for wheelchair users, which included assembling the food at a table in the seating area, did not provide a like experience because it was a substitute that lacked the personal participation in ingredient selection that is a benefit inherent to ordering from Chipotle). Courts have held that these benefits can include social interaction with other patrons. *See Kalani v. Starbucks Corp.*, 117 F. Supp. 3d 1078, 1087 (N.D. Cal. 2015) (stating that a Starbuck’s wheelchair seating selection,

which required wheelchair users to sit facing a wall with their backs to the interior of the store, hindered their social interaction with other patrons, a benefit inherent to visiting Starbucks).

In this case, it is likely that the modifications requested by Ramirez were necessary because the Café's current practices failed to provide her with a functionally equivalent experience relative to non-disabled patrons. As in *Regal Cinemas*, where the court found that a movie theater's accommodations failed to provide an equivalent experience to wheelchair users who were forced to crane their necks to view a movie screen while non-disabled patrons had a variety of comfortable viewing locations, Betts' suggestion that Ramirez sit outside the tent at a picnic table would fail to provide her with a functionally equivalent experience because she would be unable to enjoy the river, stage, and sunset that non-disabled patrons could view without obstruction. Transcript at 1. Furthermore, Yousef's concession to allow Ramirez to sit on the grassy area in front of the stage would fail to provide a functionally equivalent experience because Ramirez would be unable to enjoy the food service provided to patrons inside the tent, and she would be required to leave once the area became crowded. *Id.* at 2.

A court might also determine that these accommodations offered by the Café were not "like" experiences because they were mere substitutes that failed to provide the benefits inherent to attending a beer and music festival. As in *Antoninetti*, where the court found that Chipotle's burrito assembly process did not provide a like experience for wheelchair users because it was a substitute that lacked the benefit of personal participation inherent to the Chipotle experience, requiring Ramirez to sit at the picnic tables or on the grassy area were substitutes to sitting inside the tent that deprived her of the benefits inherent to a beer and music festival, such as ordering food and alcohol and watching a live performance. *Id.* 1-2. Moreover, the present situation is similar to *Kalani*, where the court found that requiring wheelchair users to sit facing a wall

deprived them of the inherent benefit of socialization enjoyed by non-disabled Starbucks patrons, because requiring Ramirez to sit at the picnic tables would likely isolate her from other festival attendees and fail to provide her with the social benefits inherent to the event. *Id.* at 1.

Because the accommodations offered to Ramirez deprived her of a functionally equivalent experience and amounted to mere substitutes that lacked the benefits inherent to attending a beer and music festival, the modifications that Ramirez requested were necessary.

ii. The modifications requested were reasonable because they were inexpensive, unlikely to disrupt festival operations, and would not threaten health or safety.

Determining if a modification is reasonable requires a case-by-case inquiry that considers, among other factors, the costs, disruptions to business operations, and health and safety risks associated with the modification. *Baughman* 685 F.3d at 1136; *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1065 (5th Cir. 1997). These factors should be measured in a way that provides service animals with the broadest feasible access. *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 841 (9th Cir. 2004).

Regarding costs, the Ninth Circuit has held that the price of a modification should not be disproportionate to its benefit to disabled patrons. *See Indep. Living Res. Ctr. S.F. v. Lyft, Inc.*, U.S. Dist. LEXIS (N.D. Cal. 2020) (holding that it would be unwarranted to force Lyft to implement a wheelchair accessible vehicle rideshare program because the program would require Lyft to pay \$1,200 per ride while serving, at most, 125 riders per month). In scoping the bounds of a disproportionate cost, courts hold that if the cost is close to zero dollars, it will be considered proportionate. *See Staron v. McDonald's Corp.*, 51 F.3d 353, 358 (2d Cir. 1995) (finding that the cost that McDonalds would incur by enforcing a no-smoking policy on behalf of patrons with smoke allergies would not be disproportionate because it would be close to zero dollars).

In terms of business operations, not all disruptions will make a modification unreasonable; courts have tolerated those that do not elicit complaints from other patrons. *See Lentini* 370 F.3d at 844 (affirming a district court decision requiring a performing arts center to accommodate occasional disruptive “yipping” from a disabled patron’s service dog because, among other things, the noise did not cause other patrons to complain). Courts have also permitted disruptions if they occur with limited frequency. *See Fortune*, 364 F.3d at 1084 (finding that requiring a movie theater to ensure that non-disabled patrons vacate handicapped companion seats when requested to do so would not create an undue disruption because, per the movie theater’s admissions, such events were exceedingly uncommon).

When considering safety and health impacts, concerns must be based on actual risks rather than speculation. *See Baughman*, 685 F.3d at 1137 (finding that Disney World was permitted to make a policy decision that prevented a disabled patron from using a Segway in their park, provided that their decision was founded on actual safety risks, such as pedestrian traffic volume, not speculation). In the context of venues that serve alcohol, the Fifth Circuit has held that service animals do not pose a health risk when there are areas of the venue where the animal can be accommodated without potential contamination. *See Johnson*, 116 F.3d at 1052 (holding that a guide dog did not pose a health risk at a brewery that provided public tours when there were areas of the brewery, such as a hospitality room where tour guests sampled beer, where the dog could be accommodated without the risk of contaminating alcohol).

In the present case, the costs associated with the modifications requested would likely be seen as reasonable. Unlike *Lyft*, where the court held that it would be unwarranted to require Lyft to implement a wheelchair rideshare program that would serve 125 riders per month and cost \$1,200 per ride, it would be warranted to expect the Café to seat Ramirez next to the food truck

or move other guests, because doing so would allow her to enjoy the festival while costing the Café nothing. Transcript at 1-3. As in *Staron*, where the court reasoned that the cost that McDonalds would incur by enforcing no-smoking policies in their restaurants was proportionate because it would be close to zero dollars, the costs of Ramirez’s requests are likely to be seen as proportionate because they too would be close to zero dollars. *Id.*

Furthermore, implementing the requests would not create an undue business disruption. As in *Lentini*, where the Ninth Circuit required a performing arts center to accommodate the occasional “yipping” from a disabled patron’s service dog because other customers failed to complain, a court may hold that the Café should have accommodated Sasha’s potentially disruptive barking because no festival patrons complained. R. at 1-13. Children were eager to play with her, and one patron objected when Betts requested that Ramirez remove her from the premises. R. at 13. While some patrons were distracted by her barking, none voiced complaints. *Id.* Also, as in *Fortyune*, where the court found that the burden of requiring that patrons vacate handicapped companion seats when requested would be within reason due to the infrequency of such requests, the burden of asking a table of seated customers to move next to the food truck would be within reason because it is unlikely that the Café would need to make such requests frequently, given the improbability that they are often visited by large service dogs with a proclivity for drooling and shedding. R at 11; Transcript at 1.

In addition, it is unlikely that Sasha posed any safety or health risks to other patrons. As in *Baughman*, where the court held that Disney World could deny the use of a Segway in their park if their decision was based on actual safety risks as opposed to speculation, Betts’ failure to seat Sasha by the food truck would be permissible if his concerns about her tripping servers, jumping on food, or creating a mess were non-speculative. Transcript at 1. However, at the time

that he expressed these concerns, Sasha had not behaved in a way that would indicate such risks were probable, therefore these concerns were likely speculative. *Id.* While Betts noted that Sasha was “banging into people” and “licking things,” when Ramirez asked him to move other patrons, these behaviors are unlikely to rise to the level of a real safety risk, especially given that Sasha is healthy and has no history of biting or aggressive behavior. R. at 2. Additional similarities can be drawn to *Johnson*, where the court held that a guide dog did not pose a health risk at a brewery when it could be accommodated in a beer sampling room without potential for contamination, because Sasha would not have posed a health risk at the festival had she been seated away from the food truck, safe from potential food and alcohol contamination, as Ramirez requested. Transcript at 2.

In light of their associated costs, disruptions to business operations, and health and safety risks, the modifications requested by Ramirez appear to be reasonable.

CONCLUSIONS AND RECOMMENDATIONS

As stated above, Sasha is likely a service animal under the ADA because she is individually trained to perform a specific task that directly benefits an individual with a disability. *C.L.*, 992 F.3d at 910; R. at 1-2. Furthermore, the Café likely discriminated against Ramirez because they failed to make requested modifications that were necessary and reasonable. *Fortyune*, 364 F.3d at 1081; Transcript at 1-3. For these reasons, Ramirez will likely be able to establish a claim for failure to accommodate under Title III of the ADA, and Books & Brews Salem LLC should attempt to settle this matter to avoid litigation.

As the parent company of the Café, Books & Brews Salem LLC should also take affirmative steps to prevent future discrimination by their staff. First, they should require all

employees to take a diversity, equity, and inclusion training. To be mindful of cost, they can use one of several free online courses.¹ Furthermore, they should update their policies to include ADA guidelines about questions that employees are legally permitted to ask patrons with service animals.² Finally, at future pop-up events they should require the food truck to park in their unused parking lot to mitigate concerns about food contamination, and hire one additional staff member at Marion County's \$12.75 per hour minimum wage³ to clean potential messes. *Id.* at 12. Such modifications will allow Books & Brews Salem LLC to continue to serve their clients without undue fear of future discrimination claims.

PLEDGE OF HONESTY

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion. /s/ 1131

¹ 10 free online courses on diversity, equity, and inclusion to sign up for right now that will make you a better leader, Business Insider, <https://www.businessinsider.com/free-online-courses-diversity-equity-inclusion-2020-10> (last visited Nov. 30, 2021).

² Service Animals, ADA.gov, https://www.ada.gov/service_animals_2010.htm (last visited Nov. 30, 2021).

³ Oregon Minimum Wage, Oregon Bureau of Labor and Industry, <https://www.oregon.gov/boli/workers/pages/minimum-wage.aspx> (last visited Nov. 30, 2021)

Applicant Details

First Name **Theodore**
 Middle Initial **J**
 Last Name **Salem-Mackall**
 Citizenship Status **U. S. Citizen**
 Email Address tsalemmackall@gmail.com

Address
Address
Street
2101 11th St. NW
City
Washington
State/Territory
District of Columbia
Zip
20001
Country
United States

Contact Phone Number **3019385087**

Applicant Education

BA/BS From **Colgate University**
 Date of BA/BS **June 2016**
 JD/LLB From **Georgetown University Law Center**
https://www.nalplawschools.org/employer_profile?FormID=961
 Date of JD/LLB **May 19, 2022**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **American Criminal Law Review**
 Moot Court Experience **No**

Bar Admission

Admission(s) **District of Columbia**

Prior Judicial Experience

Judicial Internships/
Externships **No**
Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Shelanski, Howard
hshelanski@law.georgetown.edu
Glover, Maria
jmg338@law.georgetown.edu
202-662-4029

Ernst, Daniel
ernst@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Theodore Salem-Mackall
2101 11th St. NW, Apt. 301
Washington, DC 20001
June 12, 2023

The Honorable Juan Sánchez
James A. Byrne U.S. Courthouse
601 Market St.
Philadelphia, PA 19106

Dear Chief Judge Sánchez,

I am a first-year associate at Cleary Gottlieb Steen & Hamilton LLP and a graduate of Georgetown University Law Center. I am writing to apply for a 2024-2025 term clerkship in your chambers.

I have enclosed my resume, writing sample, and unofficial law school transcript for your review. Three professional references are attached to this letter.

Letters of recommendation are also attached from the following:

Professor Maria Glover
Georgetown University Law Center
jmg338@georgetown.edu

Professor Daniel Ernst
Georgetown University Law Center
ernst@georgetown.edu

Professor Howard Shelanski
Georgetown University Law Center
has37@georgetown.edu

Please let me know if I can provide any additional information. I can be reached at 301-938-5087 and tsalemmackall@gmail.com. Thank you very much for your consideration.

Respectfully,

Theodore Salem-Mackall

References

Vishakha Joshi

Associate

Cleary Gottlieb Steen & Hamilton LLP

vjoshi@cgsh.com

212-225-2352

Caleb Robertson

Associate

Cleary Gottlieb Steen & Hamilton LLP

cjrobertson@cgsh.com

202-974-1924

Blake Rushforth

Chief Antitrust Counsel

Adobe

(formerly Antitrust Division trial attorney)

blake.rushforth@gmail.com

THEODORE SALEM-MACKALL

2101 11th St. NW, Apt. 301, Washington, DC 20001 • 301-938-5087 • tsalemmackall@gmail.com

EDUCATION

Georgetown University Law Center	Washington, DC
Juris Doctor, <i>cum laude</i>	May 2022
GPA: 3.82; Dean's List: Fall 2020/Spring 2021/Fall 2022/Spring 2022	
Journal: <i>American Criminal Law Review</i> Executive Board; Managing Editor of the "Annual Survey of White Collar Crime" (2021-22)	
Publications: "Hugo Will Pull My Hair Out": Justice Black and Mandatory Arbitration on the Warren Court, 48 Journal of Supreme Court History 54 (2023)	
<i>Federal Criminal Prosecutions of Labor Market Restrictions: Small Cases with Big Implications</i> , 58 Am. Crim. L. Rev. Online 101 (2021)	
"The Heart of the Business": Analysis of the Antitrust Division's New Policy of Crediting Corporate Compliance at the Charging Stage, 58 Am. Crim. L. Rev. Online 27 (2021)	
<i>Pro Bono</i> : Rising for Justice Clinic, Tenant Justice Program (January 2022-May 2022)	
Home Court Fellow, Washington Legal Clinic for the Homeless (February 2020-May 2020)	
Colgate University	Hamilton, NY
Bachelor of Arts, <i>magna cum laude</i> , in English	May 2016
GPA: 3.50	
Honors: Honors in English	
Thesis: <i>As American as it Gets</i> (family history/personal memoir)	

EXPERIENCE

Cleary Gottlieb Steen & Hamilton LLP, Washington, DC
<i>Associate</i> , October 2022-Present
Performed document review and generated substantial document chronologies in proceedings before the SEC and FINRA. Generated first drafts of filings later used in antitrust and § 1983 litigation. Performed oral argument in federal court in relation to a discovery dispute.
Georgetown University Law Center, (Remote) Washington, DC
<i>Research Assistant to Prof. Maria Glover</i> , June 2021-February 2022
Performed research and substantive drafting for Professor Glover's landmark paper <i>Mass Arbitration</i> . Generated audit trails, academic research reports and charts of arbitral claims for the article.
Cleary Gottlieb Steen & Hamilton LLP, (Remote) Washington, DC
<i>Summer Associate</i> , May 2021-July 2021
Performed legal research for antitrust matters and generated legal memos for the Structured Finance group.
U.S. Securities and Exchange Commission, Division of Enforcement, (Remote) Washington, DC
<i>Enforcement Intern</i> , May 2020-July 2020
Examined documents for potentially fraudulent trading activity and drafted deposition outline.
U.S. Department of Justice, Antitrust Division, Washington, DC
<i>Paralegal Specialist</i> , June 2016-February 2019
Reviewed substantial document productions, crafted substantive memoranda, and managed a team of paralegals as the lead paralegal in federal antitrust litigation brought by the Division.

PERSONAL INTERESTS

Songwriting (playing acoustic guitar / banjo), cooking, training in Mixed Martial Arts.

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Theodore J. Salem-Mackall
GUID: 835463932

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 08, 2022
Georgetown University Law Center
Major: Law
Honors: Cum Laude

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	002	93	Bargain, Exchange, and Liability	6.00	A-	22.02	
David Super							
LAWJ	005	33	Legal Practice: Writing and Analysis	2.00	IP	0.00	
Sonya Bonneau							
LAWJ	007	93	Property in Time	4.00	B	12.00	
Sherrally Munshi							
LAWJ	009	33	Legal Justice Seminar	3.00	A-	11.01	
Lisa Heinzerling							
EHrs QHrs QPts GPA							
Current				13.00 13.00 45.03 3.46			
Annual				13.00 13.00 45.03 3.46			
Cumulative				13.00 13.00 45.03 3.46			
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	001	93	Legal Process and Society	5.00	P	0.00	
Lawrence Solum							
LAWJ	003	93	Democracy and Coercion	4.00	P	0.00	
Allegria McLeod							
LAWJ	005	33	Legal Practice: Writing and Analysis	4.00	P	0.00	
Sonya Bonneau							
LAWJ	008	32	Government Processes	4.00	P	0.00	
Howard Shelanski							
Mandatory P/F for Spring 2020 due to COVID19							
EHrs QHrs QPts GPA							
Current				17.00 0.00 0.00 0.00			
Annual				28.00 13.00 45.03 3.46			
Cumulative				30.00 13.00 45.03 3.46			
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	015	05	American Legal History	3.00	A+	12.99	
Daniel Ernst							
LAWJ	038	07	Antitrust Law	3.00	A	12.00	
Howard Shelanski							
LAWJ	121	09	Corporations	4.00	A	16.00	
Donald Langevoort							
LAWJ	165	07	Evidence	4.00	A	16.00	
Gerald Fisher							
Dean's List Fall 2020							
EHrs QHrs QPts GPA							
Current				14.00 14.00 56.99 4.07			
Cumulative				44.00 27.00 102.02 3.78			

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Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1098	05	Complex Litigation	4.00	A	16.00	
Maria Glover							
LAWJ	1528	09	Advanced Antitrust Seminar: Antitrust and Intellectual Property	3.00	A	12.00	
Mark Popofsky							
LAWJ	1604	05	Affordable Housing Seminar	3.00	A-	11.01	
Michael Diamond							
LAWJ	396	09	Securities Regulation	3.00	A-	11.01	
Chris Brummer							
Dean's List Spring 2021							
EHrs QHrs QPts GPA							
Current				13.00 13.00 50.02 3.85			
Annual				27.00 27.00 107.01 3.96			
Cumulative				57.00 40.00 152.04 3.80			
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1647	05	Warren Court Legal History Seminar	3.00	A-	11.01	
Brad Snyder							
LAWJ	178	07	Federal Courts and the Federal System	3.00	A-	11.01	
Michael Raab							
LAWJ	215	01	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	
Jeffrey Shulman							
LAWJ	304	05	Legislation	3.00	A	12.00	
Anita Krishnakumar							
EHrs QHrs QPts GPA							
Current				13.00 13.00 48.70 3.75			
Cumulative				70.00 53.00 200.74 3.79			
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	1179	05	Modern Litigation Theory and Practice Seminar	3.00	A	12.00	
Maria Glover							
LAWJ	361	03	Professional Responsibility	2.00	A-	7.34	
Michael Rosenthal							
LAWJ	552	05	Housing Advocacy Litigation Clinic at Rising for Justice, Law Students in Court Division		NG		
Paul diBlasi							
LAWJ	552	80	~Seminar	2.00	A-	7.34	
Paul diBlasi							
LAWJ	552	81	~Casework	3.00	A	12.00	
Paul diBlasi							
LAWJ	552	82	~Professionalism	2.00	A-	7.34	
Paul diBlasi							
LAWJ	626	05	New Deal Legal History Seminar	3.00	A+	12.99	
Daniel Ernst							
Dean's List 2021-2022							

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This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Theodore J. Salem-Mackall
GUID: 835463932

----- Transcript Totals -----				
	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	59.01	3.93
Annual	28.00	28.00	107.71	3.85
Cumulative	85.00	68.00	259.75	3.82
----- End of Juris Doctor Record -----				

Unofficial

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 2021

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in support of Theodore Salem-Mackall's application for a clerkship in your chambers. Theodore is a rising 3L at Georgetown Law, where he was a student this past year in my antitrust law class. Over the course of the semester—an unusual one because of the requirement that classes occur remotely via video—I came to know Theodore quite well. He is tremendously smart, hardworking, and has a sharp eye for incisive questions. I am confident he would be an excellent law clerk.

The class in which I taught Theodore had nearly 100 students. Even in that large setting, Theodore stood out for his ability to identify the key issues in the cases we studied and intelligently discuss the analytical and doctrinal complexities that these cases usually involved. For example, Theodore's grasp of the subtleties and contradictions of rule-of-reason analysis in certain horizontal restraint classes was especially nuanced, and his clear responses to hard questions I asked during class were of great benefit to his classmates. Theodore was able to synthesize the different strands of antitrust law we studied into a coherent framework that made him a leader in our class discussions. I was very grateful to have him in class, particularly given the potentially awkward on-line format.

On several occasions I met with Theodore in office hours, during which we discussed not only antitrust law, but Theodore's broader interest in law and policy. He struck me as a thoughtful, mature, and very sharp student but, more than that, as someone with a genuine interest in a range of legal issues. I had the opportunity to discuss with Theodore some article ideas he was considering. His resulting piece on how the Department of Justice is considering corporate compliance program when making criminal antitrust charges was a sharp and well-written contribution. Based on my experience in class and reading his work, I have little doubt Theodore would make both an excellent law clerk and a good colleague in chambers.

Please do not hesitate to contact me if additional discussion would be helpful.

Sincerely,

Howard Shelanski
Professor of Law
hshelanski@georgetown.edu

Howard Shelanski - hshelanski@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing on behalf of Theodore Salem-Mackall, Georgetown University Law Center class of 2022, who has applied for a clerkship in your chambers. Theodore has an excellent record of success at Georgetown, as appears on his paper record. He was an excellent student in two of my classes, and as my research assistant, truly outstanding. Having worked very closely with him for two years, I can personally attest that he is intelligent, extremely hard-working, engaged, collaborative, and kind. He would make an excellent clerk, and I recommend him to you with great enthusiasm.

I first met Theodore as a student in my upper-level Complex Litigation course. This course is one of the hardest in the upper-level curriculum at Georgetown, and Theodore was not only up for the challenge, but he also earned an "A" on the final exam. Further, his participation in class reflected both thoughtfulness and preparation. Both in class and on the exam, his facility with and interest in civil litigation and high-level complex litigation shone through. Theodore displayed not only a firm grasp of the "black-letter" concepts, he identified and understood the various interconnections between civil litigation and redress, legal rights, and the overall regulatory apparatus in the United States.

Theodore built on his sophisticated understanding and knowledge of complex litigation in my upper-level Modern Litigation Theory and Practice Seminar. This course is writing intensive, requiring 4-5 page papers each week, and it is pitched at a very high level. It attracts top students eager to engage with difficult materials that range from economic and behavioral economic theories of law and litigation; various models of litigation and settlement (e.g., psychological, finance and options-based, access-to-justice, regulatory); settlement theory and dynamics (including mass settlement and contractual closure); third-party litigation funding models and development; contractual mandatory arbitration; and the potential rise of bankruptcy for mass disputes. Students come out of this course extremely prepared to navigate the most difficult and current issues in litigation in a sophisticated way.

A few of my seminar students have, over the years, taken their learning in my seminar even further and produced a longer, publishable-quality paper. In Theodore's case, he built on themes and concepts he had explored and asked about during the seminar and initiated his own deep dive into the history of mandatory arbitration and its reception in the Supreme Court. In so doing, he unearthed the fascinating and overlooked jurisprudence of Justice Hugo Black, who dissented in six separate decisions in which the Supreme Court enforced a mandatory arbitration agreement. Theodore then derived from these dissents a Federal Arbitration Act jurisprudence not just particular to Black himself, but one that provides somewhat of a rejoinder to—or at least a different account of—the conventional historical narrative that situates the Supreme Court's departure from early Federal Arbitration Act jurisprudence as having occurred largely post-1980. This piece clearly demonstrates Theodore's interest in and commitment to the study of law as well as his work ethic. More than this, though, it makes a novel contribution to the scholarship and study of mandatory arbitration and the Federal Arbitration Act.

Theodore's performance as a student led me to ask him to be a research assistant for the summer of 2021 and the 2021-22 academic year. This time period was one of the most intensive for my recently published study on Mass Arbitration in the *Stanford Law Review*. This Article developed the first and comprehensive case study of mass arbitration and provided a taxonomy of the results. Among other things, developing the study required countless hours of research into a complex web of ever-changing (and often hidden) arbitration agreements used by a number of corporations. Moreover, it required finding, navigating, and making sense of a labyrinth of (often incomplete) arbitral records, court filings, and motions back and forth between courts and arbitral fora. Theodore worked tirelessly to help me build the massive case dataset and to make coherent sense of its vast components. His assistance was truly integral to the production of this study, which has since garnered a number of awards, including most recently the Award for Best Paper of 2022 by the Berkeley Law Civil Justice Research Initiative and the Law and Society Association. Given this, I have no doubt that Theodore is more than up to the task of performing the extensive and difficult work involved in mastering the records and materials of the most complicated of cases.

Finally, Theodore is not just a strong student, writer, and researcher. He is also friendly and collaborative. Based on many interactions with Theodore, I am confident that he has the skills, work ethic, and care required for success in a clerkship. I urge you to give his application the most careful consideration. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

J. Maria Glover
Professor of Law

Maria Glover - jmg338@law.georgetown.edu - 202-662-4029

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of Theodore Salem-Mackall's application for a clerkship in your chambers. I know Mr. Salem-Mackall principally from two courses: (1) a twenty-five-student course in American Legal History in the Fall 2020 semester; and (2) a smaller seminar on the legal history of the New Deal in the Spring 2022 semester. I feel I know him well from our conversations in class, during office hours, and at his graduation. We have since exchanged emails and spoken about his interest in pursuing a clerkship.

American Legal History is a lecture and discussion course on the political history of legal institutions in the United States during the twentieth century, with an emphasis on administrative law, presidential power, and the legal profession. Its central argument is that the legal profession played a central law in subjecting administrative agencies and presidential acts to a particular version of the rule of law, which looked to court-like procedures, if not courts themselves, to keep official discretion in check. The exam, which was the sole basis for Mr. Salem-Mackall's grade, presented him with essays on two topics we did not cover in class but which underwent historical change much like those we did. It was the historical equivalent of an "issue-spotting" exam in a doctrinal law course.

The essays in Mr. Salem-Mackall's exam were on the law and politics of public health administration and on a Black female lawyer named Eunice H. Carter. He handled them beautifully. He aptly compared battles within the Department of the Treasury, where the Public Health Service was housed, over a plague outbreak in 1900, with roughly contemporaneous conflict over immigration within the Department of Commerce and Labor. He also was extremely good on the abandonment of *de novo* judicial review of health officials' fact finding with analogous developments the rate-setting of public utility commissions. In his answer to the second, biographical essay, he drew upon a remarkable range of materials with great specificity and aptness to compare Carter with other Black and other female lawyers. I don't believe I've ever given any exam a higher raw score in my many years teaching the course.

Even more impressive was Mr. Salem-Mackall's paper on *United States v. Socony-Vacuum* (U.S. 1940) in my seminar on the New Deal. Others have written about this judicial landmark, which established that price-fixing is illegal per se under the Sherman Act, but no one has so thoroughly researched it from its origins in the petroleum policy of the early New Deal through its disposition by the Supreme Court in a very different political climate. Mr. Salem-Mackall fully took advantage of the unusual opportunity Georgetown law students have, thanks to their proximity to the Library of Congress and the National Archives, to work in the manuscript collections of prominent lawyers and judges and federal agencies. He put in many hours in the papers of William Douglas, Robert Jackson, Stanley Reed, and the Department of Justice, as well as, on-line, those of Thurman Arnold, who was in charge of the appellate phase of the case. His final paper clearly presented the result of this research in great detail. I particularly liked its rendering of the tension between the seasoned local litigator who tried the case in Madison, Wisconsin, and the young New Deal lawyers in DOJ's Antitrust Division who not just a verdict but a precedent that remade the law. To make the paper publishable, Mr. Salem-Mackall still needs to center it more surely on a single argument, a task he has postponed while he revised a seminar paper on Justice Hugo Black and federal arbitration, which has just appeared in the *Journal of Supreme Court History*.

Yet in its present state, Mr. Salem-Mackall's research paper and his performance in his other course with me convincingly testify to his persistence, intelligence, attentiveness to detail, and imagination. In our conversations, I also found him to be interesting, thoughtful, and engaging. You get a sense of his range from his extracurricular activities as an undergraduate: He was a member of both a rugby team and an experimental theater troupe. His college thesis drew upon his experiences as the first legally adopted child by a same-sex couple in the state of Maryland. Perhaps that background accounts for his openness to those different from himself, which I observed in many classroom exchanges. I am confident he would be an exemplary clerk in your chambers, and I recommend him to you very highly.

Sincerely,

Daniel R. Ernst
Carmack Waterhouse Professor of Legal History

Daniel Ernst - ernst@georgetown.edu

Writing Sample

Theodore Salem-Mackall

The below paper was prepared in my “Warren Court Legal History Seminar” class at Georgetown University Law Center in the Fall of 2021. It examines Justice Hugo Black’s position on the Federal Arbitration Act, and the Warren Court’s evolving view towards mandatory arbitration during the 1950s and 60s. It draws on my original research into the justices’ personal papers. In June 2023, an edited version of this piece was published in the *Journal of Supreme Court History*.

Although I received feedback from Professor Brad Snyder in preparing this draft, it is entirely my own work. In accordance with your application requirements, I have only attached the piece’s first fifteen pages. These selected sections effectively display my research and writing skills, as well as the piece’s overall thesis. Please note that pages 16-21 are entirely endnotes.

“Hugo Will Pull My Hair Out”

A History of Hugo Black and Mandatory Arbitration on the Warren Court

Theodore Salem-Mackall

I. Introduction – The Former Alabama Senator

Hugo LaFayette Black was among the Supreme Court’s foremost critics of mandatory arbitration. From 1961-67, Black dissented in six cases enforcing a mandatory arbitration clause contained in a contract or collective bargaining agreement.ⁱ His dissents consistently argued that broad grants of arbitration often came at the expense of a party’s constitutional right to a fair “day in court.”ⁱⁱ The early Warren Court shared Black’s concerns. In 1953, the Court held in *Wilko v. Swan* that the right to bring Securities Act claims in federal court could not be waived through a form contract containing an arbitration agreement.ⁱⁱⁱ Yet their hostility would not last. In 1967, a very different Warren Court decided *Prima Paint v. Flood & Conklin*.^{iv} *Prima* established that the Federal Arbitration Act, passed in 1925 to make arbitration agreements “valid, irrevocable and enforceable” in federal court,^v was substantive law and could supersede state arbitration rules in diversity cases.^{vi} The decision also made arbitration clauses “severable” from the rest of contracts, allowing arbitrators to review “fraud in inducement” defenses to breach claims rather than courts.^{vii} *Prima* would be the first in a long line of Supreme Court cases that gradually established modern “liberal enforcement” of contractual arbitration clauses.^{viii} Hugo Black opposed every aspect of *Prima*. In a dissent longer than the opinion, he described it as a “statutory mutilation” which unacceptably delegated legal defenses to biased arbitrators.^{ix}

Black’s arbitration opposition stemmed from his time in the legislature, where he witnessed how special interests influenced the passage of statutes like the Federal Arbitration Act. During Black’s 12 years in the Senate, he saw “high-powered, deceptive, telegram-fixing, letter-framing, Washington-visiting [lobbyists]”^x defeat his attempts to provide municipal power to impoverished

Alabama towns,^{xi} and push for endless exemptions to his Black-Connery bill, which became the basis for the Fair Labor Standards Act.^{xii} For Black, experiences like these displayed how special interests could manipulate politics to entrench their own power.^{xiii} Black's belief in this dynamic contributed to his skepticism of the FAA. Passed just one year before his arrival in the Senate, the FAA addressed American courts' then refusal to enforce contractual agreements to arbitrate.^{xiv} Early common-law courts believed that parties could not "oust" the court of its jurisdiction through private agreement.^{xv} The FAA ended this "ouster doctrine" by making arbitration clauses "as enforceable as other contracts – no more no less."^{xvi} Many of the bill's congressional advocates intended for the law to have a narrow scope.^{xvii} Yet Black knew its effect could expand past their intent. The FAA emerged at the tail end of a long pro-arbitration lobbying campaign drawing its "principal support from trade associations...[and] commercial and mercantile groups in the major trading centers."^{xviii} To Black, the support of these groups—the same ones who opposed his New Deal reforms—indicated that the statute principally benefited entities with enough bargaining power to use arbitration clauses to preclude legal claims.^{xix} For a former Birmingham trial lawyer who believed in the value of juries',^{xx} it would be unconscionable to apply the statute in a way that waived an individual's right to their "day in Court" by the stroke of a pen. Yet, despite Black's best efforts, the Warren Court effectively allowed this to occur in *Prima Paint*.

II. Roadmap

This paper establishes Hugo Black as one of the Supreme Court's foremost critics of mandatory arbitration. It also, for the first time in the literature, examines historical materials related to the Warren Court's arbitration jurisprudence, tracing how the Court moved from support of Black's arbitration views in the early 1950s to a break with them by the late 1960s. First, it displays how the Warren Court shared Black's arbitration skepticism in 1953's *Wilko v. Swan*,^{xxi}

even as Black pushed the Justices to express more disapproval of the practice. Next, it shows how the Court moved away from Black in 1963's *Moseley v. Electronic & Missile*,^{xxii} where it declined to rule on whether claims brought under the Miller Act could be arbitrated. A Court with different personnel, and stated policies in favor of employer-union arbitration, displayed far less reticence about statutory claim arbitration than the 1953 Court did. Yet *Moseley* also saw the Justices hesitate, shirking back from allowing full arbitration of Miller Act claims, or arbitral review of fraud in inducement defenses to contract formation, in part due to heavy lobbying by Black. Then, the paper reviews 1967's *Prima Paint v. Flood & Conklin*,^{xxiii} its status as a proxy battle for the Second Circuit case *Robert Lawrence Co. v. Devonshire Fabrics*,^{xxiv} and how Black attempted to refute both cases in his venomous dissent.^{xxv} *Prima* saw Black's arbitration views get firmly rebuked by a majority looking to leave behind the Court's previous hostility to the practice. The paper concludes by reviewing how Black's arbitration views can be seen as one part of a larger theme in his jurisprudence: strong defenses of the constitutional right to a fair "day in Court" from powerful forces which could abrogate it.

III. *Wilko v. Swan* – "I Certainly Have Plenty of Biases"

The early Warren Court shared Black's antagonism towards mandatory arbitration in 1953's *Wilko v. Swan*. Anthony Wilko was induced by his stockbroker to buy 1600 shares of Air Associates common stock based on fraudulent assurances that they would increase in value.^{xxvi} He resold two weeks later at a \$3888 loss.^{xxvii} Wilko sued the brokerage under § 12(2) of the 1933 Securities Act.^{xxviii} The firm moved for a stay, asserting that their relationship was governed by contracts providing that any dispute would be determined through binding arbitration.^{xxix} Judge Henry Goddard of the Southern District of New York denied their motion,^{xxx} but a divided Second Circuit reversed, holding that parties could agree to arbitrate a dispute in advance in the same way

that parties could choose to settle.^{xxx} Judge Charles Clark argued in dissent that a binding arbitration clause in a stock purchase agreement implicitly waived § 22 of the Securities' Act's provision of a federal forum to securities buyers. This violated § 14 of the Act, which voided any waiver of compliance with its substantive requirements.^{xxxii} Clark also argued that pre-dispute arbitration agreements contravened Securities Act policy by making purchaser's rights "capable of nullification by...fine-print restrictions of the broker's devising."^{xxxiii}

The Court granted *certiorari* in *Wilko* on June 1, 1953.^{xxxiv} The case held major implications for arbitration's future. The FAA prompted many lower courts to abandon their previous hostility to the practice.^{xxxv} Arbitration clauses were becoming *de rigueur* in adhesion contracts; some 90% of stock brokerages required arbitration of customer-broker disputes by 1953.^{xxxvi} Yet it remained on shaky legal ground. Some courts still refused to enforce arbitration agreements.^{xxxvii} Questions remained about which statutory claims could be arbitrated.^{xxxviii} Early Supreme Court cases interpreting the FAA only dealt with the Act in relation to maritime law and were inapposite on these issues.^{xxxix} *Wilko* represented a turning point. A ruling in favor of arbitration could expand it to a wider range of claims and contracts. A decision against it could require "almost every [stockbroker] margin contract...to be rewritten."^{xl}

Unfortunately, Anthony Wilko was not ready to litigate his important case. Wilko was broke; his counsel did not file a brief with the Second Circuit,^{xli} and he proceeded *in forma pauperis* at the Supreme Court due to "losses sustained in [the] transaction."^{xlii} So the S.E.C., wanting to ensure vigorous Securities Act enforcement, entered the fray. The agency filed an *amicus* brief^{xliii} that Wilko's counsel deferred to,^{xliv} participated in oral argument,^{xlvi} and made itself the dispute's "primary party."^{xlvi} The agency's arguments echoed Judge Clark's dissent; pre-dispute agreements to arbitrate Securities Act § 12(2) claims were a void waiver of the statute's provision of a federal

venue,^{xlvii} and arbitrating these claims frustrated purchasers' statutory rights because arbitrators would act "according to their business background" rather than in plaintiffs' interest.^{xlviii} The broker's brief pointed to the lack of specific exemptions for Securities Act claims in the Federal Arbitration Act's text.^{xliv}

Wilko receded into conference on December 9, 1953,¹ where Justice Hugo Black was among the first to speak.^{li} Black stated that the case came down to a conflicting presumption between the Arbitration and Securities Acts. Yet here, the Securities Act won out. It guaranteed stock purchasers a federal forum, so they were not bound by pre-dispute arbitration agreements that foreclosed this right.^{lii} He also expressed approval of Judge Clark's dissent, and its holding that arbitration of Securities Act claims could frustrate their enforcement.^{liii} Yet Justice Stanley F. Reed pushed back, arguing that the Court could not hold that arbitration was unable to vindicate statutory rights.^{liv} William O. Douglas, Harold H. Burton, and the newly appointed Chief Justice Earl Warren voted with Black to reverse, but the rest of the Court went with Reed.^{lv} After conference, *Wilko* was a 5-4 vote in favor of pre-dispute arbitration of federal statutory claims. Justice Reed was assigned the majority opinion.^{lvi}

Wilko almost vastly expanded the Federal Arbitration Act's reach in the 1950s, until Justice Reed underwent a change of heart. After a series of tortured drafts,^{lvii} Reed wrote the Court on November 20 saying that "further consideration" of *Wilko* lead him to change his mind.^{lviii} He circulated a new memo which later became the majority opinion.^{lix} Reed's memo showed his vacillation, writing that "two [statutory] policies, not easily reconcilable, are involved in this case."^{lx} Yet it ultimately endorsed Justice Black's position at conference: pre-dispute arbitration agreements waived purchasers' right to proceed in federal court in violation of § 14 of the

Securities Act, and Congress's goal of creating an efficient cause of action for defrauded purchasers was "better carried out" by making those agreements unenforceable.^{lxi}

Reed's reversal made *Wilko* a defeat for arbitration, but a win for Hugo Black. Black approved of Reed's new draft, writing Reed two days after it circulated that he was "glad he came out that way."^{lxii} However, Black also pushed Reed to make his draft even harsher on arbitration. Where Reed took pains to state "the Federal Arbitration Act establishes the desirability of arbitration as an alternative to the complications of litigation," Black noted that "arbitration can be just as complicated [as litigation]" and "its usefulness has been greatly exaggerated."^{lxiii} Where Reed ended by "discounting...any bias that we as judges...have for the judicial process as against arbitration..." Black wrote "I certainly have plenty [of biases against it] insofar as a man's right to sue is to be governed by law rather than by contract where bargaining power of the parties' is essentially unequal."^{lxiv}

Reed did not adopt Black's rhetoric, but his final opinion relayed Black's views on the case.^{lxv} It also won a 6-2 majority, as Tom Clark switched his vote from conference,^{lxvi} and Robert Jackson concurred in the judgement.^{lxvii} Even the case's dissenters, Felix Frankfurter and Sherman Minton, admitted some questions about arbitration. While Frankfurter did not believe that Securities Act claimants would be unable to vindicate their rights in arbitration,^{lxviii} he admitted that, if *Wilko* faced no choice but to assent to this clause, then it could be unconscionable.^{lxix} The Court went from allowing Securities Act arbitration at conference to expressing unanimous skepticism about its use in this context. However, the Court's good days of agreement on arbitration^{lxx} were coming to an end.

IV. *Moseley v. Electronic & Missile* – "No Room for Halfway Decisions"

After *Wilko*, the Warren Court next addressed the Federal Arbitration Act's application to a statutory claim in 1963's *Moseley v. Electronic & Missile*.^{lxxi} *Moseley* involved a federal subcontractor who brought a damages claim against their general contractor under the Miller Act,^{lxxii} which grants subcontractors that cause of action.^{lxxiii} The prime contractor filed a motion to compel arbitration under their agreement's terms.^{lxxiv} The Middle District of Georgia enjoined the arbitration because the subcontractor raised a colorable fraud in inducement defense which the federal court had to resolve.^{lxxv} Judge Elbert Tuttle reversed for a divided Fifth Circuit, holding that the FAA "expressly and unequivocally" conferred a right to arbitrate disputes.^{lxxvi} In addition, Judge Tuttle held that the arbitrator, rather than the federal court, could litigate the fraud in inducement defense.^{lxxvii} In making this holding, the Fifth Circuit adopted the reasoning of a recent Second Circuit case called *Robert Lawrence v. Devonshire Fabrics*.^{lxxviii} *Devonshire* saw Judge Harold Medina hold that the FAA was a substantive statute which precluded state arbitration law,^{lxxix} and, where a plaintiff raised fraudulent inducement as a defense to a motion to compel arbitration, arbitrators' could review the fraud claim unless their defense centered *specifically* on the arbitration clause.^{lxxx} *Devonshire* was a major step towards expanding the FAA.^{lxxxi} Its importance was not lost on the Supreme Court, who granted a writ of *certiorari* to the case in 1960,^{lxxxii} only to see it dismissed after a settlement.^{lxxxiii}

The Court granted a writ of *certiorari* in *Moseley* on December 3, 1962.^{lxxxiv} This grant followed a split 4-5 vote, with Byron White and Arthur Goldberg switching their initial votes^{lxxxv} due to the "important question of the availability of commercial arbitration under the Miller Act."^{lxxxvi} Only Earl Warren and Hugo Black voted to grant the writ the entire time.^{lxxxvii} Black likely did so because *Moseley* represented another chance to preclude arbitration of federal statutory claims. Both sides in *Moseley* raised similar arguments to those from *Wilko*. Petitioner

argued that allowing Miller Act arbitration negated the statute's federal forum and impaired enforcement;^{lxxxviii} respondent focused on the FAA's lack of specifically enumerated exceptions for Miller Act claims.^{lxxxix} Yet *Moseley* also presented other issues which were not raised in *Wilko*. The case involved questions about whether interstate commerce was involved,^{xc} the inherent unfairness of forcing a Georgia subcontractor to arbitrate their claim in New York,^{xci} and the question of whether the fraud in inducement claim had to be litigated by the federal court, or if the arbitrator could resolve the issue.^{xcii} On this issue, respondent's brief, just like the Fifth Circuit, approvingly cited *Devonshire*'s holding that "arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision itself was fraudulently procured."^{xciii}

At oral argument, Hugo Black made clear that he believed all *Moseley*'s issues should be resolved one way: against arbitration. When respondents' counsel argued that the Miller Act was a "venues statute which could be waived," he asked sarcastically, "do you think [Congress] left [claims] to that [federal] forum without saying anything?"^{xciv} Black also challenged respondents' argument that arbitration must take place in New York, stating that a ruling in their favor required the Court "to hold that 435 members of Congress...passed [the FAA] intending that [a] man in South Georgia could waive his right to have his case tried under the Miller Act in South Georgia, and must go all the way to New York or to London...Or to Switzerland...in order to try his case."^{xcv} Black also implied that the subcontractor had the right to have the federal court, not the arbitrator, decide the fraud claim. As Black said, "the books are filled with cases that people have been defrauded by written contracts," and courts had a right to review them.^{xcvi}

Black voted to reverse at *Moseley*'s April 19 conference, although his specific comments are not recorded.^{xcvii} Earl Warren also voted to reverse, "[agreeing] with" Black that Miller Act claims

could not be arbitrated.^{xcviii} However, their position found no other supporters. Byron White and Tom Clark only said that the case involved “interstate commerce” and so was covered by the FAA.^{xcix} William J. Brennan and Arthur Goldberg made clear that the Miller Act did not preclude arbitration.^c Justice John Marshall Harlan II even endorsed *Devonshire*.^{ci} The entire Court, except for Black and Warren,^{cii} held that Miller Act claims were arbitrable, and only modified the lower court’s decision by holding that the arbitration should take place in Georgia rather than New York.^{ciii} The arbitration hostility which the Warren Court exhibited in *Wilko* now seemed nonexistent, with little explanation as to why.

The Warren Court’s shift on FAA arbitration in *Moseley* may have been influenced by its recent endorsement of arbitration between employers and labor unions. Labor arbitration developed separately from commercial arbitration,^{civ} and was a widely-used “middle-class panacea” for labor conflict by the 1950s.^{cv} The Court expressed approval of the practice in 1957’s *Textile Workers Union v. Lincoln Mills*,^{cvi} holding that § 301 of the Labor Management Relations Act generated a “congressional policy” in favor of labor arbitration.^{cvii} It reaffirmed this support three years later in a trio of cases known as the “*Steelworkers* trilogy,”^{cviii} holding that *Wilko*’s “hostility” to arbitration arose where it was “the substitute for litigation.”^{cix} In the labor context, arbitration was “the substitute for industrial strife.” Courts should encourage this more peaceful practice by resolving “doubts [as to enforceability] ... in favor of coverage.”^{cx}

Hugo Black did not participate in the consideration or decision of *Lincoln Mills* or *Steelworkers*.^{cx} He never endorsed their reasoning, but also never expressed disapproval. He also voted to enforce some labor arbitration clauses in cases deferring to *Steelworkers*.^{cxii} This was not surprising. Black was a workers’ rights advocate dating back to the New Deal.^{cxiii} In theory, labor arbitration served worker’s interests by encouraging employers to enter collective bargaining

agreements. Yet Black's pro-labor sentiments did not prevent him from becoming the Warren Court's preeminent employer-union arbitration skeptic in the early 1960s. In case after case, Black accused the court of letting their "leanings to treat arbitration as an almost sure and certain solvent of all labor troubles" override other issues with granting enforcement."^{cxiv} However, he almost always dissented alone.^{cxv} This Warren Court, and its new appointee Arthur Goldberg in particular, favored unions,^{cxvi} and the unions supported labor arbitration.^{cxvii} The Justices were not going to endorse Black's stubborn opposition to labor's "new kingpin."^{cxviii} Of course, until 1963, the Court's arbitration endorsement remained centered on the employer-union context. *Moseley's* conference indicated how easy it might be to extend the Court's warm feelings on labor arbitration to arbitration of statutory claims.^{cxix}

However, conference was not the end of deliberations in *Moseley*. Black soon began looking to exert influence with the other Justices. On April 22, three days after conference, Black sent a letter to the Court suggesting that a ruling in favor of the general contractor in *Moseley* would require them to overturn their precedent.^{cxx} The next day, Black wrote a letter to Justice Arthur Goldberg.^{cxxi} Hoping to "at least...get [Goldberg] to look closely at [*Moseley*]'s materials,"^{cxxii} he played on the Justice's pro-labor sympathies. Black wrote Goldberg that "I read the legislative history of the [FAA] last night...[That] Act was drafted and promoted by merchants and was intended to meet their particular needs. The Arbitration Act could not have been passed but for assurances...that its arbitration system could not be applied to industrial workers and employment contracts...This is one of the many reasons why I said to you in re *Moseley* that there is no room for halfway decisions. Whether you are right or wrong in believing that arbitration of labor disputes is a highly desirable public policy, I am convinced by the history and language of the Arbitration Act that it would be a complete distortion...to hold that it applies to employment contracts..."^{cxxiii}

Black would not stop there. On May 31, 1962, he circulated a massive memo to the Court explicitly outlining his views on arbitration, and arguing for a reversal in *Moseley*.^{cxxiv} This memo included a range of arguments: allowing arbitration of Miller Act claims could increase public works' expenditures,^{cxxv} the transaction did not involve "interstate commerce,"^{cxxvi} and any arbitration which takes place should occur in Georgia, not New York.^{cxxvii} Black also attacked the lower court's endorsement of *Devonshire*, and its holding that fraud in inducement claims could be decided by an arbitrator rather than a federal court.^{cxxviii} *Moseley*'s subcontractor made colorable allegations of fraud. § 4 of the FAA stated that a court must be satisfied that the "making of the agreement for arbitration...is not in issue" in order to enforce an agreement.^{cxxix} Black, ever the textualist, pointed out that a fraud in inducement claim necessarily puts the "making" of an agreement at issue. He also pointed to statements by FAA sponsors stating that courts must hear "all defenses, equitable and legal" which could exist before enforcing arbitration agreements; this would encompass fraud in inducement.^{cxix}

Black's memo primarily centered on two arguments that were central to his view of arbitration: a statutory grant of a federal forum could not be waived through pre-dispute contracts involving unequal bargaining power,^{cxixi} and allowing arbitration of statutory claims could frustrate their vindication.^{cxixii} Black supported his first claim by pointing out how *Moseley*'s federal contractor, who essentially possessed a monopsony after the contract was granted, imposed this venue waiver on a subcontractor without leverage. The court could not hold that the subcontractor truly assented to this dispute resolution method given how "theoretical equality of opportunity to bargain at arm's length is often a fiction in our world of commercial reality."^{cxixiii} Enforcing the waiver was even more objectionable in the context of the Miller Act, which was "meant to guard against the evils resulting from inequality of bargaining power" between these

parties.^{cxxxiv} Black made his second argument, that arbitration of statutory claims impaired enforcement, by looking at the FAA's history. Drawing on his Senate experience, he pointed out that the statute "must be interpreted in light of the [large business interests] of the bill's supporters."^{cxxxv} The FAA was drafted by, and principally benefited, large mercantile groups. Its enacting legislature intended for it to only apply to simple contractual disputes within that community.^{cxxxvi} They certainly did not intend for it to apply to captive consumers, employees, or subcontractors.^{cxxxvii} Here, perhaps understanding the gap between him and the rest of the Court on labor arbitration, Black also distinguished *Moseley* from that context; "it does not follow that because [labor] arbitration has value in such situations the [FAA] should be construed to cover any and all areas...heedless of the commands of other statutes designed to preserve the ancient, treasured right to judicial trials."^{cxxxviii} Then, he again related this arbitration back to the corrupt intent of the FAA's drafters: "we should be especially careful not to apply the Arbitration Act sweepingly in view of the avowed purpose of its proponents to do away with the constitutional right to trial by jury."^{cxxxix} Citing a statement by one of the bill's drafters, stating that one of the "evils" it was intended to address was the failure of non-expert juries to reach decisions "regarded as just...by the standards of the business world,"^{exl} Black warned that they should look carefully at a bill "intended to do away with what its supporters called an 'evil' but the Constitution calls a 'right.'"^{exli}

Black was moving mountains to make the Court see his view. At first, they appeared to be having none of it. Tom Clark's early drafts ignored most of Black's arguments.^{exlii} They rejected his view that the Miller Act's federal venue could not be waived. There was no enumerated arbitration exception in the Miller Act, and the FAA "deemed [arbitration] to be in furtherance of, rather than detrimental to, the public interest."^{exliii} Upon reading Clark's draft on June 3, Black

prepared to make his memo a dissent.^{cxliv} Yet Black's memo may have slowly influenced the rest of the Court. Clark noted on one draft that "Black is the only one who would...reverse the Court of Appeals...the Justice and the others agree with the Arbitration point made by Black. But they think the DC could go on to decide the other points in the contract..."^{cxlv} This indicates that Black's arbitration memo was getting some traction. Other justices were also taking issue with Clark's draft. Goldberg wrote him that "I am generally in agreement with...the result you have reached, but the route you have taken to get there...troubles me,"^{cxlvi} while Douglas noted that they should perhaps remand to the District Court instead of the arbitrator.^{cxlvii} Eventually, all these issues got to Tom Clark. On June 5th, Clark sent Douglas a short note written on a flashcard: "I have been talking to the brothers and they are convinced that we do not need to reach the arbitration issue. It was not an issue as to enforceability below as the respondent did not pray for anything other than a stay. I have therefore...eliminated this part of the opinion." Knowing how this would affect their anti-arbitration colleague, Clark added, "I suppose this will cause Hugo to pull my hair out but I believe that it is right."^{cxlviii}

Moseley came down on July 11, 1962 as a very short opinion.^{cxlix} It did not rule on the arbitrability of Miller Act claims, whether the case involved interstate commerce, or any of its other issues. It only remanded to the lower Court to determine the subcontractor's fraud in inducement defense.^{cl} Black's vast memo was shaped down to a short concurrence joined only by Warren.^{cli} The concurrence pointed out the questions which the opinion left open but approved of the decision to remand to the District Court. It also cast enmity towards *Devonshire*, and its allowance for arbitrators to review fraud in inducement claims; "fraud in the procurement of an arbitration contract makes it void and unenforceable and this question of fraud is a judicial one which must be decided by a court."^{clii}

Moseley displayed that this Warren Court had very different arbitration views than the one which decided *Wilko*. Gone were Reed’s reversals, Jackson’s protection of judicial review for arbitral decisions, Burton’s concerns about arbitrator bias,^{cliii} or even Frankfurter’s admission that some arbitration clauses could be unconscionable. In their place were justices with more positive views of the practice. William Brennan pushed for arbitration as a labor lawyer.^{cliv} John Marshall Harlan II’s endorsement of *Devonshire* in conference indicated that he was an advocate of it.^{clv} Byron White went on to join FAA decisions which went farther than the Warren Court would.^{clvi} Even Black’s old allies appeared to be reversing their earlier positions. Tom Clark was always unpredictable.^{clvii} William Douglas was strongly in favor of labor arbitration, having written the opinions in *Lincoln Mills*^{clviii} and *Steelworkers*,^{clix} and voted with the majority in *Moseley*. Even Earl Warren, who did vote with Black, tended to care more about getting the “right” result than following a consistent reasoning.^{clx} However, *Moseley* probably did not make Black “pull out” anybody’s hair. He may have just breathed a sigh of relief. The final opinion did not oppose Miller Act arbitrability, but it did not endorse it. The Court still remanded to the District Court, not the arbitrator, to determine the subcontractor’s fraud defense.^{clxi} This defeated any Supreme Court endorsement of *Devonshire*. Black could call this one a draw. Yet the war over *Devonshire* was not over.

ⁱ See *Local 174 Teamsters, Chauffeurs, Warehousemen & Helpers of America, v. Lucas Flour Company*, 369 U.S. 95, 107-10 (1962); *James B. Carey, as President of the Int’l Union of Electrical, Radio & Machine Workers, AFL-CIO v. Westinghouse Electric Corp.*, 375 U.S. 261, 274-76 (1964) (J. Black dissenting); *Republic Steel Corp. v. Charlie Maddox*, 379 U.S. 650, 660-70 (1965) (J. Black dissenting); *Florence Simmons v. Union News Co.*, 382 U.S. 884, 884-88 (1965) (J. Black dissenting); *Manuel Vaca et al. v. Niles Sipes, Administrator of the Estate of Benjamin Owens, Jr., Deceased.*, 386 U.S. 171, 204-10 (J. Black dissenting) (1967); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407-25 (1967) (J. Black dissenting). See also, *Sinclair Refining Co. v. Samuel M. Atkinson et al.*, 370 U.S. 370, 370 (foreclosing federal court injunctions against strikes even when utilized to enforce mandatory arbitration agreements within collective bargaining agreements in a majority opinion by Black); *Commonwealth Coatings Corp. v. Continental Casualty Co., et al.*, 393 U.S. 145, 145 (1968) (holding that courts could set aside arbitral awards where relevant financial biases were not disclosed through a decision in an opinion by Black); *H.W. Moseley v. Electronic & Missile Facilities, Inc., et al.*, 374 U.S. 167 (1963) (discussed *infra* at p. 10-21).

ⁱⁱ See, e.g., *Republic Steel*, 379 U.S. at 669 (J. Black dissenting) (arguing against the Court’s grant of mandatory arbitration based in part on “a vast difference between [the Court’s] philosophy and mine concerning...the role of courts in our country...it was in [Magna Carta] that there originally was expressed in the English-speaking world a deep desire of people to be able to see differences according to standard, well-known procedures in courts. Because of these deepseated desires, the right to sue and be sued in courts according to the ‘law of the land’ became recognized...); *Prima Paint*, 388 U.S. at 407 (J. Black dissenting) (“I am by no means sure that forcing a person to forgo his opportunity to try his legal issues in the courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is not a denial of due process of law.”).

ⁱⁱⁱ See *Wilko v. Swan*, 346 U.S. 427, 428-29 (1953).

^{iv} See *Prima Paint*, 388 U.S. at 395.

^v 9 U.S.C. § 2.

^{vi} *Prima*, 388 U.S. at 404-05. This decision implicitly overruled a 1956 Supreme Court holding that the Federal Arbitration Act was a procedural statute that could “affect the rule of decision,” and could violate *Erie R. Co. v. Tompkins* if applied to override contrary state law. See *Norman C. Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 198 (1956).

^{vii} *Prima*, 388 U.S. at 402-04.

^{viii} See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 638, 654-59 (1996) (discussing how *Prima* started to expand the FAA’s scope); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Act Never Passed By Congress*, 34 FLA. ST. U. L. REV. 99, 114-23 (relaying how *Prima* paved the way to a llo w FAA application to states); Pierre H. Bergeron, *At the Crosroads of Federalism and Arbitration: The Application of Prima Paint to Purportedly Void Contracts*, 93 KY. L. J. 423, 426-34 (2004) (discussing *Prima*’s creation of a seperability doctrine for arbitration clauses); J. Maria Glover, *Mass Arbitration*, STAN. L. REV. at 52 n.326 (forthcoming) (last revised: Nov. 6, 2021) available at SSRN (discussing *Prima* as the first in a long line of FAA Supreme Court precedent expanding the statute).

^{ix} *Prima*, 388 U.S. at 416 (J. Black dissenting).

^x UNITED STATES SENATE, *Lobbyists*, (Sep. 28, 1987) (last updated 1989) available at [Perma](#) (quoting Hugo Black’s radio address in relation to a bill opposed by private utility lobbyists).

^{xi} See Virginia Van der Veer Hamilton, *HUGO BLACK: THE ALABAMA YEARS*, Univ. of Alabama Press at 178 (1982) available at Google Books.

^{xii} See Roger K. Newman, *HUGO BLACK: A BIOGRAPHY*, Fordham Univ. Press, 217-18 (1997).

^{xiii} See, *id.* at 154.

^{xiv} See, e.g., *Insurance Co. v. Morse*, 22 L.Ed. 365 at 365 (1874).

^{xv} Their holdings followed an ancient common-law doctrine against the practice. See, e.g., *Vynoir’s Case*, 8 Co. Rep. 81b et seq. (1609). See, also, Steven A. Certilman, *A Brief History of Arbitration in the United States*, N.Y.S. DISP. RESOL. LAWYER 10, 10-13 (discussing arbitration in the early Republic).

^{xvi} See Julius Cohen & Henry Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV., 265, 270 (1926) (describing the Act’s limited intent).

^{xvii} See, e.g., Moses, *supra* note 8, at 105-12, (describing how the act’s supporters did not believe that it would apply to any workers or consumers, and the act’s own drafters believed it would not apply to important statutory claims); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L.R. 1939, 1964-90 (arguing that the FAA was intended only to redress federal court procedural failings court as part of a wider 1930s legal reform movement); Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America’s Civil Justice System*, 24 VA. J. SOC. POL’Y & L. 195, 203-07 (describing how the FAA was not intended to apply in state court); Richard Frankel, *The Arbitration Clause as Super Contract*, WASH. U. L. REV., 531, 538-40 (2014) (discussing how the statute was not intended to intrude on state substantive law).

^{xviii} *Prima Paint*, 388 U.S. at 409 n.2 (citing 50 A.B.A.Rep. 357 (1925)). Black’s claim is accurate. See Moses, *Statutory Misconstruction*, *supra* note 8 at 101 (relaying how the FAA’s principal drafters, Julius Cohen and Charles Bernheimer, were drawn from the New York State Chamber of Commerce, and “organized the support of the national business organizations” in favor of the bill).

^{xix} As discussed *infra*, at p. 17-18. These concerns existed in debates over the statute’s passage. For example, in committee debates related to the bill, Senator Bill Walsh of Montana raised concerns that arbitration clauses might be imposed by powerful actors on consumers or employees in order to foreclose legal claims. See Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9-11 (1923).

- ^{xx} See Newman, *supra* note 12 at 34 (describing Black's "devout belief in the jury system" as beginning during his years in Alabama trial courts); 372 (relaying one of Black's major legal goals as "ensuring a fair trial in accordance with constitutional safeguards").
- ^{xxi} *Wilko*, 346 U.S. at 346.
- ^{xxii} *Moseley*, 374 U.S. at 167.
- ^{xxiii} See *Prima*, 388 U.S. at 388.
- ^{xxiv} *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir., 1959).
- ^{xxv} See *Prima*, 388 U.S., 402-25 (J. Black dissenting).
- ^{xxvi} See *Wilko*, 346 U.S. at 428-29.
- ^{xxvii} See, *id.* at 429.
- ^{xxviii} See Brief for the Securities and Exchange Comm'n as Amicus Curiae, *Wilko v. Swan*, No. 39, 1953 WL 78482 at *6-8 (1953).
- ^{xxix} *Wilko*, 346 U.S. at 429-30.
- ^{xxx} *Wilko v. Swan*, 107 F. Supp. 75, 76 (S.D.N.Y., 1952).
- ^{xxxi} *Wilko v. Swan*, 201 F.2d 439, 439 (2d Cir., 1953).
- ^{xxxii} *Id.* at 444. (J. Clark, dissenting).
- ^{xxxiii} *Wilko*, 201 F.2d at 446 (J. Clark Dissenting).
- ^{xxxiv} See *Wilko v. Swan*, et al., 345 U.S. 969 (1953).
- ^{xxxv} See, e.g., *Park Constr. Co. v. Indep. School Dist. No. 32*, 296 N.W. 475, 477 (Minn. 1941) (expressing disapproval of the old "ouster doctrine").
- ^{xxxvi} See, *Washington Checklist: Supreme Court to Hear Investor's Complaint on His Margin Account*, WALL ST. JOURN., p. 3 (Jun. 2, 1953), available at ProQuest Historical Newspapers (citing the New York Stock Exchange for this statistic).
- ^{xxxvii} See, e.g., *Kulukundis Shipping Co. S/A v. Amtorg Trading Corporation*, 126 F.2d 978, 986 (2d Cir., 1942) (refusing to submit a maritime dispute to arbitration).
- ^{xxxviii} See *Cohen & Dayton*, *supra* note 16 at 270 (describing the Act's limited intent).
- ^{xxxix} The Court ruled on four cases related to the FAA before 1953, all of which implicated maritime law. See *Shanferoke Coal & Supply v. Westchester Service Corp.*, 293 U.S. 449 (1935); *Schoenamsgruber v. Hamburg American*, 294 U.S. 449 (1935); *Marine Transit Corp. v. Dreyfus et al.*, 284 U.S. 263 (1932); *The Anaconda v. American Sugar Refining Co.*, 342 U.S. 42, 45 (1944). In one, the Court declined to rule on whether a federal court could compel specific performance of an arbitration agreement which required state arbitration. See, *Shanferoke*, 293 U.S. at 452-53. In another, the Supreme Court granted parties' to a maritime transaction the right to proceed in both arbitration and federal court. See, *The Anaconda*, 342 U.S. at 45.
- ^{xl} See *Supreme Court to Hear Investor's Complaint*, *supra* note TK. See also, "Bench Memo," Harold Burton Papers, Library of Congress, Madison Building, Box 224, at *4 (Oct. 21, 1953). (expressing worries that allowing arbitration clauses in stock purchase agreements would allow the "trade to avoid the statute by sticking it in a clause requiring disputes to be arbitrated by their own boys.") [hereinafter "Burton *Wilko* Bench Memo].
- ^{xli} See Request of Amicus Curiae to Participate in Oral Argument, William O. Douglas Papers, Library of Congress, Madison Building, Box 1146, Court Memoranda, No. 39 (Oct. 2, 1953).
- ^{xlii} See Petition for Leave to Proceed *in Forma Pauperis*, Stanley F. Reed Papers, Univ. of Kentucky, Box 154, Folder 7, No. 39 (1953).
- ^{xliii} See Brief for the Securities & Exchange Comm'n., *Wilko v. Swan*, at *6-8.
- ^{xliv} See Petitioner's Brief, *Wilko v. Swan*, No. 39, 1953 WL 78483 at *3-4 (1953).
- ^{xlvi} See Request of SEC to Participate in Oral Argument, Earl Warren Papers, available at Georgetown University Law Center, Georgetown Law Library, Microfilm Collection, Reel 8, No. 39 (1953) (reproduced from the Collections of the Manuscript Division, Library of Congress).
- ^{xlvi} Cert. Memo to CA 2, Earl Warren Papers, available at Georgetown University Law Center, Williams Library, Microfilm Collection, Reel 8, No. 39 at 6 (1953) (reproduced from the Collections of the Manuscript Division, Library of Congress).
- ^{xlvi} Brief for the Securities & Exchange Comm'n, *supra* note at *20-22.
- ^{xlviii} *Id.* At 14.
- ^{xlix} See Brief for Respondents Joseph E. Swan, et al., *Wilko v. Swan*, No. 39, 1953 WL 78484 at *10-12 (Oct. 15, 1953). The FAA only made specific exemptions for "contracts of employment" involving seamen, railroad employees, and other workers engaged in interstate commerce. See 9 U.S.C. § 1.
- ^l See *Wilko v. Swan* Record of Opinions Circulated, Robert Jackson Papers, Library of Congress, Madison Building Box 184, No. 39, (1953) (displaying the date) [hereinafter "Robert Jackson *Wilko* Notes"].

- ^{li} See, *Wilko v. Swan* Conference Notes, William Douglas Papers, Library of Congress, Box 1147, Argued Cases, *Wilko v. Swan*, No. 39 (1953) [hereinafter “Douglas *Wilko* Conference Notes”].
- ^{lii} See, “Douglas *Wilko* Conference Notes,” *supra* note 51. See also, “Robert Jackson *Wilko* Notes,” *supra* note 51 (writing that Black said “could not be bound by arbitration”).
- ^{liii} See “Douglas *Wilko* Conference Notes,” *supra* note 51.
- ^{liv} See, *id.*
- ^{lv} See, *id.* See also, *Wilko v. Swan* Conference Notes, Harold Burton Papers, Library of Congress, Madison Building, Box 239, No. 39 at *1-2 (showing a similar account of proceedings).
- ^{lvi} See Docket Book, Harold Burton Papers, Library of Congress, Madison Building, Box 238, No. 39 (1953).
- ^{lvii} See, *Wilko v. Swan* Draft Opinion, Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 7, at *7 (1953) (showing heavily edited Reed drafts in which he attempts to rule the opposite way in *Wilko*).
- ^{lviii} See “To the Conference,” Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 7 (Nov. 20, 1953).
- ^{lix} See *Wilko v. Swan* Memorandum, Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 6 at *1 (Nov. 20, 1953) (in which “memorandum by Reed” is crossed off and labeled “opinion”).
- ^{lx} *Id.* at 11.
- ^{lxi} *Id.*
- ^{lxii} *Wilko v. Swan* Memorandum, Stanley F. Reed Papers, University of Kentucky, Box 154, Folder 6, at *12 (Nov. 22, 1953).
- ^{lxiii} *Id.* at 5-6.
- ^{lxiv} *Id.* at 11.
- ^{lxv} *Wilko*, 346 U.S. at 427.
- ^{lxvi} *Id.*
- ^{lxvii} See, *id.* at 438-39 (J. Jackson Concurring).
- ^{lxviii} See, *id.* at 439-40. (J. Frankfurter, dissenting). Frankfurter’s opposition was meaningful given his pivotal role in creating and implementing the Securities Act. See Adam C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 842, 842 (2009) (describing Frankfurter’s “pervasive” involvement with the securities laws).
- ^{lxix} See, *Wilko* 346 U.S. at 440 (J. Frankfurter dissenting).
- ^{lxx} See also, *Polygraphic* 350 U.S. at 198 (holding, in a majority opinion that Black joined, that the FAA was a procedural statute and did not supersede state law).
- ^{lxxi} See *Moseley*, 374 U.S. at 167.
- ^{lxxii} See, *id.*
- ^{lxxiii} See 40 U.S.C. § 3133.
- ^{lxxiv} See *Moseley*, 374 U.S. at 168.
- ^{lxxv} See *Electronic & Missile Facilities, Inc. v. U.S. for Use of Moseley*, 306 F.2d 554, 555 (1962).
- ^{lxxvi} See, *id.* at 554, 555-58. Judge Richard Rives, in dissent, said allowing arbitration of this claim would run against the intent of the Miller Act. See, *id.* at 558-60 (J. Rives dissenting).
- ^{lxxvii} See, *id.* at 558.
- ^{lxxviii} 271 F.2d 402 (2d Cir., 1959).
- ^{lxxix} *Id.* at 406-09
- ^{lxxx} *Devonshire*, 271 F.2d at 409-12.
- ^{lxxxi} See, *id.* at 410 (“any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars.”).
- ^{lxxxii} See *Devonshire*, 362 U.S. at 909.
- ^{lxxxiii} See *Prima Paint Corp. v. Flood & Conklin* Cert. Memo, William O. Douglas Papers, Library of Congress, Madison Building, Box 1380, No. 343 at *1 (Aug. 30, 1966) [hereinafter “Douglas *Prima Paint* Cert. Memo”].
- ^{lxxxiv} See *United States of the Use of H.W. Moseley, d/b/a Moseley Plumbing and Heating Company v. Electronic & Missile Facilities*, 371 U.S. 919, 919 (1962).
- ^{lxxxv} See *United States for the Use of H.W. Moseley d/b/a Mosely Plumbing and Heating Company vs. Electronic & Missile Facilities Inc., et al.* Docket Book, William O. Douglas Papers, Library of Congress, Madison Building, Box 1280, No. 401 [hereinafter “Douglas *Moseley* Docket Book”].
- ^{lxxxvi} See Arthur J. Goldberg, *Memorandum to the Conference Re: No. 401 United States for the Use of H.W. Moseley d/b/a Mosely Plumbing and Heating Company vs. Electronic & Missile Facilities Inc., et al.*, William O. Douglas Papers, Library of Congress, Madison Building, Box 1282, Office Memoranda, No. 401 (Nov. 19, 1962).
- ^{lxxxvii} See “Douglas *Moseley* Docket Book,” *supra* note 85.

- ^{lxxxviii} See Brief of Petitioner, *U.S.A. for the use of Moseley v. Electronic & Missile*, No. 401, 1963 WL 105581 at *28-31 (Jan. 25, 1963) [hereinafter “*Moseley* Petitioner Brief”].
- ^{lxxxix} See Brief of Respondents, *U.S.A. for the use of Moseley v. Electronic & Missile*, No. 401, 1963 WL 105582 at *6 (Feb. 28, 1963) [hereinafter “*Moseley* Respondents’ Brief”].
- ^{xc} See “*Moseley* Petitioner Brief,” *supra* note 88, at *36-39.
- ^{xc i} See “*Moseley* Petitioner Brief,” *supra* note 88 at *15-16.
- ^{xc ii} See “*Moseley* Respondents’ Brief,” *supra* note 89 at *17-21.
- ^{xc iii} *Id.* at *17.
- ^{xc iv} See Oral Argument, *Moseley v. Electronic & Missile Facilities, Inc.*, No. 401, OYEZ, (Apr. 16, 1963) <https://www.oyez.org/cases/1962/401>.
- ^{xc v} See Oral Argument, *Moseley v. Electronic & Missile Facilities, Inc.*, No. 401, OYEZ, (Apr. 17, 1963) <https://www.oyez.org/cases/1962/401>.
- ^{xc vi} See, *id.*
- ^{xc vii} See *U.S. for Use of Moseley v. Electronic & Missile Facilities, Inc.* Conference Notes, Library of Congress, Madison Building, Box 1260, Argued Cases, No. 401 at *1 (1962) [hereinafter “*Douglas Moseley* Conference Notes”].
- ^{xc viii} See, *id.*
- ^{xc ix} See, *id.* at *1-2.
- ^c See, *id.* at *2-3.
- ^{ci} See, *id.* at 2.
- ^{c ii} See, *id.* at *4.
- ^{c iii} See, *id.* at *2-4.
- ^{c iv} See, e.g., Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 25 No. 3 U.F.L.R. 373, 376 (Summer 1983).
- ^{c v} Arbitration agreements were often utilized in exchange for no-strike clauses. See generally, W.E. Akin, *Arbitration and Labor Conflict: The Middle Class Panacea, 1886-1900*, 29 No. 4 THE LABOR HISTORIAN 565 (1967) (describing this process).
- ^{c vi} 353 U.S. 448 (1957).
- ^{c vii} *Id.* at 458.
- ^{c viii} *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.* 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).
- ^{c ix} See *United Steelworkers v. Warrior & Gulf*, 363 U.S. at 578.
- ^{c x} *Id.* at 582-83.
- ^{c xi} *Id.* at 585.
- ^{c xii} See, e.g. *Drake Bakeries, Inc. v. Local 50, Am. Bakery and Confectionary Workers Intern.*, AFL-CIO, 370 U.S. 254, 254 (1962); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 543 (1962) (upholding a previously negotiated arbitration clause following a corporate merger). In *Drake*, Black admitted he “had some doubts about [enforcing arbitration]” in the case, but was “persuaded” by Justice White’s opinion. See *Drake Bakeries v. Local 50* Draft, Byron White Papers, Library of Congress, Madison Building, at *12 (Jun. 11, 1962).
- ^{c xiii} See Newman, *supra* note 12, at 195.
- ^{c xiv} See *Carey v. Westinghouse*, at 275 (J. Black Dissenting). This section only scratches the surface of Black’s dissents in labor arbitration cases. See, *Lucas Flour*, 369 U.S. at 107-10 (J. Black dissenting) (accusing the court of amending a contract in favor of a pro-arbitration policy preference); *Republic Steel v. Maddox*, 379 U.S. at 660-70 (J. Black dissenting) (making a range of arguments against requiring a steelworker to bring a damages claim through union grievance procedures before bringing any state court claim) *Simmons v. Union News*, 382 U.S. at 884-88 (1965) (J. Black dissenting) (dissenting from a denial of *certiorari* in a case involving a labor union which refused to bring a claim into grievance procedure); *Vaca v. Sipes*, 386 U.S. at 207 (J. Black dissenting) (“today the Court holds that an employee with a meritorious claim has no absolute right to have it either litigated or arbitrated...”).
- ^{c xv} Earl Warren and Tom Clark each joined him once; no other justices would. See *Simmons v. Union News*, 382 U.S. at 884-88 (1965) (J. Black dissenting); *Carey v. Westinghouse*, 375 U.S. at 275 (J. Black dissenting).
- ^{c xvi} See, e.g., Lee Modjeska, *Labor and the Warren Court*, 8 IND. RELATIONS L. J. 479, 479 (1986) (“the Warren Court supported the Wagner Act philosophies of strong unionism and vigorous support of the principle of collective bargaining...”).
- ^{c xvii} See, e.g., Brief for the Petitioner, *United Steelworkers of America v. Am. Manuf. Co.*, No. 360, 1960 WL 63603, at *29-41 (Mar. 11, 1960) (laying out the importance of arbitration to collective bargaining). Indeed, labor arbitration was important enough to unions that, during one 1965 case dealing with whether a union steelworker could bring a backpay claim in state court or had to initially bring the claim through labor grievance procedures, the AFL-CIO filed

its first ever *amicus* brief taking an *employer's* side in an employee-employer dispute. See Brief for the American Federation of Labor and Congress of Indus. Orgs. as Amicus Curiae, *Republic Steel Corp. v. Maddox*, No. 43, 1964 WL 81230, at *1-6 (Aug. 18, 1964).

^{cxviii} See *Sinclair v. Atkinson*, 370 U.S. at 228 (J. Brennan dissenting).

^{cxix} See also, Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: AN Idea Whose Time Had Come*, 52 BAYLOR L. REV. 781 (Fall 2000) (analyzing essential similarities between commercial and labor arbitration law).

^{cxx} See *Re: No. 401 – United States for the Use of H.W. Moseley d/v/a Moseley Plumbing and Hearing Company v. Electronic & Missile Facilities, Inc., et al*; Hugo L. Black Papers, Library of Congress, Madison Building, Box 373 (Apr. 22, 1963). The letter argued that a decision in favor of respondent in *Moseley* would overturn the Court's 1956 holding in *Polygraphic* that the FAA was a procedural statute which did not apply in state courts. See *Polygraphic*, 350 U.S. at 198.

^{cxxi} See Letter to Arthur Goldberg, Hugo L. Black Papers, Library of Congress, Madison Building, Box 373, *Moseley v. Electronic and Missile Facilities* at *1 (Apr. 23, 1963) [hereinafter "Black Goldberg Letter"].

^{cxixii} See Note from Clerk Clay to Hugo Black, Hugo L. Black Papers, Library of Congress, Madison Building, Box 373, *Moseley v. Electronic and Missile Facilities* (Apr. 1963).

^{cxixiii} See "Black Goldberg Letter," *supra* note 121, at *1.

^{cxixiv} See Memorandum for the Conference by Mr. Justice Black, Justice William J. Brennan Papers, Library of Congress, Madison Building, Box 373, *United States ex rel. Moseley v. Electronic & Missile Facilities* (May 31 1963) [hereinafter "Black *Moseley* Arbitration Memo"].

^{cxixv} See, *id.* at 6.

^{cxixvi} See, *id.* at 26-29.

^{cxixvii} See, *id.* at 23-25.

^{cxixviii} See, *id.* at 26.

^{cxixix} *Id.*

^{cxixx} "Black *Moseley* Arbitration Memo," *supra* note 124, at 26.

^{cxixxi} See, *id.* at 3-14.

^{cxixxii} See, *id.* at 14-24.

^{cxixxiii} *Id.* at 23.

^{cxixxiv} *Id.* at 21.

^{cxixxv} *Id.* at 15.

^{cxixxvi} *Id.* at 15-20.

^{cxixxvii} *Id.*

^{cxixxviii} "Black *Moseley* Arbitration Memo," *supra* note 124, 21-22.

^{cxixxix} *Id.* at 22.

^{cxl} See, *id.* (citing Joint Hearings before the Subcommittees of the Committee on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 35 (1924)).

^{cxli} Black *Moseley* Arbitration Memo, *supra* note 124, at 23.

^{cxlii} Draft Opinion, William J. Brennan Papers, Library of Congress, Madison Building, Box 1:92, Folder 62-401, *United States ex rel Moseley v. Electronic & Missile Facilities*, at 1-7 (Jun. 4, 1963).

^{cxliiii} *Id.* at 4-6.

^{cxliv} See Memo for the Conference, Hugo L. Black Papers, Library of Congress, Madison Building, Box 373, *Moseley v. Electronic and Missile Facilities* (June 3, 1963) (crossing out "memo" and writing "dissent").

^{cxlv} *Moseley* Memo, Tom Clark Papers, University of Texas, Box A146, Folder 11, at *1 (May 1963).

^{cxlvi} Letter from Arthur Goldberg to Tom Clark, "Re: No. 401 – U.S. for Use of Moseley etc. v. Electronic & Missile Facilities", University of Texas, Box A146, Folder 11, at *1-2 (Jun. 5, 1963).

^{cxlvii} See *Moseley* Circulated Draft Opinion, Tom Clark Papers, University of Texas, Box A146, Folder 11, at *1 (Jun. 5, 1963).

^{cxlviii} Note from Tom Clark to William Douglas, William O. Douglas Papers, Library of Congress, Madison Building, Box 1283, Office Memoranda, Miscellaneous (June 5, 1963).

^{cxlix} See *Moseley*, 371 U.S. at 167.

^{cl} See, *id.*, at 168-72.

^{cli} See, *id.* at 172-72 (J. Black concurring).

^{clii} *Moseley*, 371 U.S. at 172 (J. Black Concurring).

^{cliii} See "Burton Wilko Bench Memo," *supra* note 40, at *4.

^{cliv} See Francis P. McQuade & Alexander T. Kardos, *Mr. Justice Brennan and His Legal Philosophy*, 33 NOTRE DAME L. REV. 321, 325 (1958).

^{clv} See “Douglas Moseley Conference Notes,” *supra* note 97, at *2.

^{clvi} See, e.g., *Southland Corp. v. Keating*, 456 U.S. 1, 10-16 (1984) (holding that the FAA completely displaced state law).

^{clvii} See Newman, *supra* note 20, at 546 (describing frustration at “Clark’s pogo-stick-like unpredictability”).

^{clviii} See *Lincoln Mills*, 353 U.S. at 448.

^{clix} See *United Steelworkers v. Warrior & Gulf*, 363 U.S. at 564.

^{clx} This reality once made Black quip about Warren that he “wished he knew a little more law.” See, *id.* at 566.

^{clxi} *Moseley*, 371 U.S. at 172 (J. Black Concurring).

Applicant Details

First Name **Benjamin**
 Last Name **Salvatore**
 Citizenship Status **U. S. Citizen**
 Email Address bpsalvatore@icloud.com
 Address

Address
Street
832 Hunters Drive
City
Deptford
State/Territory
New Jersey
Zip
08096
Country
United States

Contact Phone Number **267-575-8860**

Applicant Education

BA/BS From **Rowan University**
 Date of BA/BS **December 2020**
 JD/LLB From **Rutgers University School of Law--Camden**
http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=23101&yr=2011
 Date of JD/LLB **May 15, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Rutgers University Law Review**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial	
Internships/	Yes
Externships	
Post-graduate	
Judicial Law	No
Clerk	

Specialized Work Experience

Recommenders

Lore III, John
jclore@camden.rutgers.edu
(856) 225-6222
Simkins, Sandra
ssimkins@camden.rutgers.edu
856 225 6646
Dane, Perry
dane@camden.rutgers.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Benjamin Paul Salvatore
832 Hunters Drive, Deptford, N.J. 08096 | 267-575-8860 | benjamin.salvatore@rutgers.edu

3 June 2023

Honorable Juan R. Sánchez, Chief Judge
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1797

Dear Chief Judge Sánchez,

I am a rising third-year student at Rutgers Law School, and am writing to express my interest in serving as a clerk in your Honor's chambers. I began to aspire to the position after deciding that a clerkship at the federal trial level would be most rewarding and after reading some of your opinions. I believe that I possess the necessary curiosity in research, commitment in drafting, and passion in argument to make a meaningful contribution to the work of the Court.

My qualifications include a notable learning history, writing affinity, and advocacy strategy. I earned the highest grade in my Property, Constitutional Law, and Legal Writing II courses. I was selected for the Rutgers University Law Review and a Legal Writing Teacher Assistantship, both of which have provided the opportunity to examine the articulation of others and sharpen my own. I spent the summer after my first year of law school in the Rutgers Civil Practice Clinic—Veteran Advocacy Department, where I handled such matters as the reimbursement of a grantee of a federal agency. More recently, I served as judicial extern to Chief Judge Renée Marie Bumb of the United States District Court for the District of New Jersey, an experience that made me more acutely aware of various procedural postures and associated burdens of proof as I drafted opinions.

I am confident that my legal studies and practical experience, supplemented by my undergraduate background in formal logic and policy research, will enable me to serve effectively in your Honor's chambers. The enclosed resume provides a more detailed account of my personal and professional characteristics. I hope for the opportunity to meet with you in the near future to discuss my interest and qualifications. Your consideration is appreciated.

Respectfully,



Benjamin Salvatore
J.D. Candidate
Rutgers School of Law
Class of 2024

Benjamin Paul Salvatore

832 Hunters Drive Deptford, NJ 08096 | 267-575-8860 | benjamin.salvatore@rutgers.edu

EDUCATION

Rutgers School of Law, Camden, NJ

Candidate for Juris Doctor Degree, May 2024

GPA: 3.733

Activities: Rutgers University Law Review, Executive Editor
Legal Writing Teacher's Assistant, August 2022–April 2023

Rowan University, Glassboro, NJ

Bachelor of Arts in Mathematics, December 2020

GPA: 4.0

Bachelor of Arts in Political Science, December 2020

GPA: 4.0

Activities: Philosophy Club

EXPERIENCE

Wade Clark Mulcahy, LLP, Philadelphia

Law Clerk, Summer 2023

U.S. District Court for the District of New Jersey, Camden Vicinage

Judicial Extern to Chief United States District Judge Renée Marie Bumb, Jan. 2023–April 2023

- Drafted opinions and orders on federal questions and disputes in diversity jurisdiction
- Researched validity of briefs and proposed orders

Rutgers Civil Practice Clinic – Veterans Advocacy Program, Camden, NJ

Legal Intern, May 2022–August 2022

- Wrote memos arguing claims to discharge upgrades and service-related benefits
- Researched decisions about grantee entitlements and the duties of the VA

Bernstein Services Corp. – Huntington Learning Center, Turnersville, NJ

Mathematics Tutor, March 2021–August 2021

- Directed elementary, high school, and college students in their math studies
- Instructed college-bound students in *SAT* readiness

Political Science and Economics Department (RUPSED) – Rowan University, Glassboro, NJ

Research Assistant, July 2018–June 2020

- Collected and annotated articles relevant to publications emerging from RUPSED
- Made use of the platforms *R*, *Microsoft Excel*, and *EBSCOhost*

Westville Food Bank – Catholic Charities, Camden, NJ

Inventory Assistant, March 2019–October 2019

- Assembled care packages for visiting families
- Planned project times with management

SKILLS AND INTERESTS

Java programming, policy feedback theory, British literature, and old movies

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter of recommendation in support of Benjamin Salvatore and his application for a judicial clerkship. Since Benjamin's enrollment in my Evidence course, I have had the pleasure of teaching and engaging with Benjamin on a frequent basis. Benjamin has demonstrated that he is a very dedicated, intelligent, and hard-working student with a high aptitude for the study and practice of the law. Benjamin earned an A in Evidence and was one of the top performing students in the nearly 100 student class. Evidence had a strict curve, and an A demonstrates a high level of understanding of the material.

Evidence was taught through a combination of lecture, readings, demonstration, and problems. Each student was responsible for the daily preparation of assigned problems that are designed to work through and teach certain evidentiary concepts. Throughout 42 class sessions each student had to be prepared to discuss all of the assigned problems, sometimes totaling more than fifteen per class session. The various problems also emphasized the importance of theory choice by lawyers, as well as the interrelationship among the rules of trial procedure, ethics, and evidence. Students were evaluated by their level of preparation and understanding of these various problems and the assigned material.

Benjamin was one of the 2 most active students in the class and demonstrated a passion for understanding both the basic and advanced level evidence concepts. Throughout the semester, Benjamin was consistently called upon to answer and discuss the possible resolution of various problems. He demonstrated his thorough and careful preparation each time that he was called upon. Benjamin would frequently come to me after class to take the opportunity to get a deeper understanding of the problems that he answered but also of the arguments that his classmates made. For example, when we transitioned from character evidence to habit evidence, it is often difficult for students to grasp the differences between the rules and the permissible uses of each type of evidence. After dealing with a particularly challenging problem in class, Benjamin and I had a long discussion about how character evidence can be misused for improper purposes at trial. He demonstrated a deep understanding of the rules and the specific ways in which courts must be careful that jurors do not use habit evidence in an impermissible way. This is just one example of the many discussions I had with Benjamin throughout the semester which demonstrated his ability to think deeply and critically about the rules of evidence. His passion for understanding the rules and related concepts was unmatched in the class, which made him a pleasure to teach. Additionally, the pure intellectual curiosity that he possesses will be a valuable asset in his career as a judicial clerk and as a practicing lawyer.

Benjamin had one of the highest grades in the class while scoring 96 out of a possible 100 points in the class. Throughout the semester, the entire class was given quizzes. Benjamin was able to get a perfect 40 out of 40 questions correct which was at the very top of the class. During his final exam, he answered 19 of 20 multiple questions correctly and received 37 out of 40 possible points on the essay portion. His performance throughout the class and his overall score on the final exam demonstrated his advanced understanding of the concepts I was covering throughout the semester. His high-level understanding of the material is consistent with what he has achieved throughout law school, not just in my class. His current GPA likely places him near the top of his class.

Although I have not had the opportunity to see a lot of his legal writing, his Evidence exam was very well-written and organized. The exam duration was 2 hours and given under intense time-pressure. Benjamin is also a member of the Rutgers Law Review and a teaching assistant for Legal Research and writing. Both positions are strong evidence of his commitment to high quality research and writing.

I am confident that Benjamin's demonstrated ability will make him a highly successful judicial clerk. It is my pleasure to unequivocally and without hesitation recommend Benjamin for a position. Please do not hesitate to contact me directly at (856) 225-6222 if I can be of any further assistance.

Sincerely,
J.C. Lore
J.C. Lore III

John Lore III - jclore@camden.rutgers.edu - (856) 225-6222

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my great pleasure to write on behalf of Benjamin "Ben" Salvatore's application for a clerkship. I have no doubt he will be a great asset to your office.

I am currently a Legal Writing and Research Professor at Rutgers Law School, and formerly the Director of the Children's Justice Clinic. I have been an attorney for over twenty years and have supervised many students both in practice and in the classroom. During the past academic year (Fall 2022- Spring 2023), I had the good fortune to have Ben as my Legal Writing Fellow in both Legal Writing I and II. I can say without hesitation that Ben is an extraordinary student and will make an outstanding law clerk.

I chose Ben to be my Legal Writing Fellow because of his outstanding work as a student in my LAWR I and II course during the 2021- 2022 academic year. Ben has an extraordinary skillset. His legal memos and briefs are both concise and thorough. He deftly analyzes the issues and cases in a way that is easy to understand and read. It is because of his superior writing ability I suggested he apply for law journal and for a Federal Judicial Clerkship, both of which he successfully achieved.

As a teaching fellow this year, Ben works with students as a mentor but not as a grader. He is there as a support system for students and to do that needs to be extremely well-versed in what I am teaching students and what they are working on. By way of context, for over fifteen years, the legal writing program in Camden (and now across all of Rutgers Law School) has been recognized by peers with a top-20 position in the U.S. News & World Report's Law School Specialty Subjects ranking. In part, we owe our national reputation to the attention the professors pay to developing the analytical and client-centered skills the students need to be future lawyers. Our teaching fellow program also stands out, nationally, as one of the best parts of our program: through it we offer our first-year students more hands-on tutoring because both the professor and the teaching fellows have constant one-on-one contact with the students. We view the legal writing course series as part of a trajectory that begins in the 1L year and continues through the advanced and experiential externship and clinic courses. The case file simulations used in my sections of the course are all set in New Jersey.

This year in his role of teaching fellow, Ben has been one of the most sought-after fellows. He is approachable, organized, knowledgeable, and helpful. Students found him so helpful that at the end of the year I asked him to present to the entire class on the process of getting onto law journal.

In addition to Ben's writing ability, he has strong interpersonal skills. As a professor, I enjoyed working with him because he was reliable, motivated and was able to anticipate what I needed before I asked him. I never had to ask him twice to do something, and whatever I did ask him to do he did very well.

In sum, I can't think of a better choice than Ben Salvatore as a judicial clerk. If you have any other questions, please don't hesitate to contact me.

Sincerely,

Sandra Simkins, Esq.
Distinguished Clinical Professor of Law
Rutgers Law Children's Justice Clinic

Sandra Simkins - ssimkins@camden.rutgers.edu - 856 225 6646

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am delighted to recommend Benjamin Salvatore for a clerkship in your chambers. Ben was a student in my seminar on "Legalism," where he easily earned the grade of A+. More important, he is a remarkable young man. He is smart, eloquent, intellectually inquisitive, imaginative, and diligent. He is also decent and personable. He would serve you well and you would enjoy having him help you in your work.

The "Legalism" seminar examines a variety of cases, in addition to historical and philosophical materials, to examine some basic questions at the core of our identity as lawyers: What is "legalism"? What, if anything, distinguishes "legalistic" forms of legal analysis and interpretation? How, if at all, is "legalism" related to literalism? Is "legalism" inevitable in the law and legal understanding? In any event, is "legalism" good or bad? How, if at all, does it contribute to public criticism of the legal system and the legal profession? How do these questions inform specific legal questions, including the definition of perjury, the construction of deeds and other instruments, the interpretation of statutes (including the Civil Rights Act of 1964), and more?

Ben was the most active participant in our class discussions. But his comments were never superfluous. On the contrary, he was always informed and relevant. And he always said something interesting and worthwhile that shed new light on whatever we were discussing.

The course required students to write a short paper, a longer paper, and a collaborative paper. Ben excelled in all these assignments. I was especially impressed with his long paper, which carefully employed some of the ideas we had been discussing in class to explore an apparently theological question – what it would mean to lie to God – and then use that analysis to shed light on more mundane puzzles about the nature of lying to human beings. The paper was both meticulous and bold, and it was a real joy to read and mull over. Ben was also very good at responding to my comments on his first draft and producing an even better final product.

Ben's performance in my class was no fluke. He has garnered a series of outstanding grades throughout his law school career. He graduated from college with a 4.0 GPA in his two majors, Mathematics (a field not known for grade inflation) and Political Science. He is currently an editor on the Rutgers University Law Review and a Teacher's Assistant in Legal Writing.

Ben has also acquired the sort of practical experience that would serve him well as a judicial clerk. He has externed for a federal district judge in New Jersey and worked in the Rutgers Civil Practice Clinic Veterans Advocacy Program. He served as a research assistant in college.

It is also worth emphasizing that Ben is just a nice young man. He is enthusiastic about ideas and about his work, but also pleasant and good-natured. Chatting with him about any subject is a genuine pleasure.

Many years ago, I clerked for the Honorable William J. Brennan, Jr., on the United States Supreme Court. Since then, teaching at both the Yale Law School and here at the Rutgers Law School, I have come to know many talented students. Ben Salvatore clearly stands out even in that august cohort. I commend him for your attention and hope that you give his application the most serious consideration. He would serve you well in your chambers and would be a delight to have around.

Please let me know if I can be of any further assistance.

Sincerely,
Perry Dane
Professor of Law

Perry Dane - dane@camden.rutgers.edu

Benjamin Paul Salvatore

832 Hunters Drive Deptford, NJ 08096 | 267-575-8860 | benjamin.salvatore@rutgers.edu

The following writing sample is derived from an opinion I wrote while a judicial extern in the chambers of Chief Judge Renée Marie Bumb of the United States District Court for the District of New Jersey. It is substantially my own work. It has been reformatted as a memorandum to the Court in order to obscure identifying information.

The opinion that the memorandum informs is a denial of a motion to withdraw a guilty plea, requiring interpretation of a criminal statute along with a charging information. It contains a consideration of the defendant's mistake of fact and waiver of the right to challenge venue.

Judicial Memorandum

Date: April 21, 2023

To: The Court

From: Benjamin Salvatore, J.D. Candidate 2024

Re: Motion to Withdraw Guilty Plea

This matter comes before the Court upon a joint request by the defendant Josue Pichardo (“Defendant”) and the Government that Defendant be permitted to withdraw a plea of guilty. [Docket Nos. 59, 63 (together, “Joint Request for Withdrawal”).] Both parties maintain that the Information to which Defendant pled guilty incorrectly charged Defendant with illegally possessing heroin in Camden County, New Jersey, when he only ever possessed that substance in Philadelphia, Pennsylvania. Subsequent testing showed that the controlled substance he possessed in Camden County was in fact fentanyl. [Docket No. 63 at 3, 4.] This inaccuracy in the Information, the Parties allege, led to Defendant’s pleading guilty to possession of the wrong controlled substance and being deprived the opportunity to object to venue before waiving it through his plea.

However, Defendant was charged with one count under 21 U.S.C. § 841(a)(1) and (b)(1)(B), which makes it a crime, *inter alia*, to distribute or possess with intent to distribute a controlled substance. Defendant possessed fentanyl, a controlled substance under federal law, in Camden County, New Jersey. Thus, and for reasons set forth below, I recommend that Defendant not be permitted to withdraw his plea under these circumstances, as they do not manifest a “fair and just reason for requesting withdrawal.” Fed. R. Crim. P. 11(d)(2)(B).

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was arrested in Philadelphia on April 3, 2019 [Docket No. 1 “Complaint”], and later charged with knowingly and intentionally distributing and possessing with intent to distribute 100 grams or more of a mixture and substance containing a detectable amount of heroin on or about March 7, 2019 in Camden County, New Jersey and elsewhere. [Docket No. 33 (“Information”).] Defendant pled guilty on April 7, 2021 to an Information charging such. [Docket No. 38 “Plea Agreement.”] On October 4, 2021, Defendant requested a hearing to determine if he would be permitted to withdraw his guilty plea, because he found his Presentence Investigation Report to be inconsistent with his understanding of the sentencing guideline range as explained to him by counsel. [Docket No. 46.]

On September 7, 2022, a hearing was held, at which Defendant and the Government requested that Defendant be permitted to withdraw his guilty plea, this time because the Information was factually inaccurate in its description of the offense. [Docket No. 60.] At the hearing, the Government explained that Defendant had not possessed heroin in Camden County. An accurate charge, the Government maintained, would have been one of conspiracy to possess with intent to distribute 100 grams or more of heroin and 40 grams or more of fentanyl from in or around February 2019 through on or about April 3, 2019 in Camden County, New Jersey and elsewhere. [Docket Nos. 63, 33.] At the conclusion of the hearing, this Court ordered further briefing from the parties, including as to whether Defendant waived any challenges to venue in entering his guilty plea.

The Government submitted supplemental briefing on October 5, 2022. [Docket No. 63.] Therein, it argues that the Joint Request for Withdrawal should be granted according to

the Third Circuit's decision in *United States v. Wilson*, 974 F.3d 320, 365-67 (3d Cir. 2020). The Government maintains that Defendant has waived any venue challenges by entering his guilty plea, but that Defendant's lack of knowledge of the factual inaccuracy in the Information is nevertheless sufficient reason to allow withdrawal. The Government also maintains in its supplemental briefing that it is bound by its original plea agreement with Defendant, and thus an offense level of 28 must be preserved. The Government suggests that since Defendant never possessed heroin in Camden County, his possession of heroin elsewhere would compound his offense level. However, If the two instances of controlled substance possession were captured in a conspiracy count pursuant to 21 § U.S.C. 846, offense level 28 would continue to apply. [Docket No 63 at 1.] Defendant's counsel joins entirely in the Government's supplemental briefing and has added no new substantive legal arguments. [Docket No. 64.]

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 11(d)(2)(B), a defendant may withdraw a plea of guilty after the court accepts the plea if he does so before sentencing and “can show a fair and just reason for requesting the withdrawal.” In *Wilson*, The Third Circuit found that whether a reason for withdrawal satisfies this requirement is dependent upon three factors: “(1) whether the defendant asserts his innocence; (2) the strength of the defendant's reasons for withdrawing the plea; and (3) whether the government would be prejudiced by the withdrawal.” *United States v. Wilson*, 429 F.3d 455, 458 (3d Cir 2005) (quoting *United States v. Jones*, 336 F.3d 245, 252 (3d Cir. 2023)). The *Wilson* Court found that a bald assertion of innocence without supporting facts did not satisfy the first prong, and that a Rule 11 plea colloquy in which a court took care to determine voluntariness defeated the second prong.

Id. at 458-69. This left no need to reach the third. *Id.* at 460, note 5 (citing *Jones*, 336 F.3d at 255) (“[T]he Government need not show such prejudice when a defendant has failed to demonstrate that the other factors support a withdrawal of the plea.”).

III. ANALYSIS

A. The Factual Inaccuracy in the Information Does Not Support Withdrawal.

Not every factual inaccuracy that could occur in an information necessarily leads to a defendant’s being charged with violating a criminal provision that, but for the inaccuracy, would not be applicable to his conduct. Indeed, there exist certain factual inaccuracies that do not change the applicability of the criminal provision in an information, including those that charge a defendant with violating a provision in a different manner than he actually violated it. This is such a case.

Here, the Court might best draw an analogy to the oft-unsuccessful “mistake of fact” defense; when a criminal defendant is charged with possession of one controlled substance but argues that he actually possessed another, he remains liable for possession of the actually possessed controlled substance. See *United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001) (holding that the district court properly determined a sentence for cocaine, rather than heroine, even though defendant believed he was carrying cocaine and that *mens rea* requirement of knowledge was satisfied as to possession of a controlled substance). Similarly, I recommend the Court find that when possession of either of two controlled substances is prohibited by the same statutory provision, an information charging a defendant with possession of one controlled substance in violation of that provision when he actually possessed the other is indeed factually inaccurate. Here, such an inaccuracy does not change the applicability of the underlying provisions to Defendant’s conduct, given that

he did in fact possess a controlled substance, and so does not absolve Defendant of criminal liability.

The Information charged Defendant with possessing heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) when he actually possessed fentanyl. Both substances are “controlled substances” under Schedule II. To be sure, 21 U.S.C. § 841(a)(1) refers to that broad category of substances and captures both heroin and fentanyl. Further, (b)(1)(B) captures fentanyl in prong (vi). See *United States v. Taylor*, No. 18-0093, 2022 WL 1046566 (W.D. Pa. April 6, 2022); *United States v. Johnson*, Crim. No. 18-62, 2021 WL 719659 (W.D. Pa. Feb 24, 2021). While the Information charged Defendant with possession of a specific controlled substance in violation of two provisions of Section 841 when he actually possessed a distinct controlled substance, this factual inaccuracy does not cause Defendant to be charged with violating any criminal provision that is not applicable to his conduct, because both substances are prohibited by the same two statutory provisions. The two provisions under Section 841 were no less violated when Defendant actually possessed fentanyl than when he theoretically possessed heroin.

The Court should consider whether the factual inaccuracy in the Information charging Defendant, though short of causing Defendant to be charged with violating a provision that is not applicable to his conduct, still represents in itself a fair and just reason for requesting withdrawal under Federal Rule of Civil Procedure 11(d)(2)(B). Applying the standard articulated in *Wilson*, this factual inaccuracy, which has no greater effect than altering the *manner* in which a criminal provision was violated, cannot be said to represent such a reason. I recommend that the Court consider the three *Wilson* factors, in turn.

First, Defendant does not “maintain his innocence.” *Wilson*, 429 F.3d at 458.

Defendant’s counsel and the Government assert only that defendant is innocent of possessing heroin in Camden County, not that he is innocent of violating the provisions of Section 841 under which he was charged.

Second, Defendant does not provide a reason for withdrawing his guilty plea that is of sufficient “strength.” *Id.* In *Wilson*, the court entertained the idea that coercion in entering one’s guilty plea would be a reason of sufficient strength to support withdrawal, but ultimately found no coercion and an insufficiently strong reason for withdrawal in its absence. *Id.* at 459. Herein, Defendant alleges no coercion in entering his guilty plea, only ignorance as to its factual inaccuracy. Since, as established, this factual inaccuracy does not expose Defendant to criminal responsibility under a provision inapplicable to his conduct, the Court should not be convinced that ignorance of it is a sufficiently strong reason for withdrawal.

Third, it is unclear whether the Government will be “prejudiced by the withdrawal.” *Id.* at 458. *Wilson* did not reach this prong, nor did its predecessor case *United States v. Jones*, 336 F.3d 245 (3d Cir. 2003). Rather, the Third Circuit found in *Jones* that such prejudice need not be shown when a defendant fails to show that the other two factors support a withdrawal of the plea. *Jones*, 336 F.3d at 255. Defendant fails to assert his innocence of violating either of the provisions of Section 841 under which he was charged and fails to provide a strong reason for requesting withdrawal, so there is no need to reach the question of whether the Government would be prejudiced by a withdrawal of Defendant’s guilty plea.

B. Defendant’s Waiver of Venue Does Not Support Withdrawal.

Finally, I recommend that the Court find that Defendant's entry of a guilty plea in this case represents an effective waiver of venue, and that such waiver does not represent a fair and just reason for requesting withdrawal. The Third Circuit has found that, because all federal courts have jurisdiction to hear criminal cases arising under federal statutes, factual innocence in the District of the guilty plea does not represent a jurisdictional defect that is non-waivable. *United States v. King*, 604 F.3d 125, 139 (3d Cir. 2010). Thus, a proper guilty plea effectively waives any subsequent challenges to venue.

The Parties argue that since Defendant was unaware of the Information's factual inaccuracy as to the controlled substance he possessed in Camden County, he may not have waived venue "knowingly" [Docket No. 63 at 4.] Regardless, the Court should not be persuaded that the type of factual inaccuracy present within the Information would have affected Defendant's venue selection.

The portion of the Information that the Parties assert might have, if accurate, affected Defendant's intention to relinquish his right to challenge venue is not an inaccuracy that alters the applicability of the relevant criminal statute to his conduct. If the inaccuracy did alter the applicability, it might well affect Defendant's choice of venue. But, the Information merely indicates that Defendant possessed heroin where it should indicate that he possessed fentanyl; Section 841 remains applicable to his conduct. Maintaining that Defendant, with lack of knowledge as to the substance he possessed but full knowledge as to the criminal provisions he violated, was without a fact necessary to form an intention as to venue selection is assigning unreasonable weight to the inaccuracy in the Information.

Finally, it should be noted that Defendant's express intention if the Court were to grant the Joint Request for Withdrawal is to reenter a guilty plea with no change of venue.

Thus, whether any unknowing relinquishment would be a fair and just reason for requesting withdrawal is inconsequential, because Defendant does not seek to challenge venue.

IV. CONCLUSION

For the foregoing reasons, I recommend that the Joint Request for Withdrawal be denied.

Applicant Details

First Name	Edwardo		
Last Name	Sanchez		
Citizenship Status	U. S. Citizen		
Email Address	sancedwa@icloud.com		
Address	<table> <tr> <th>Address</th> </tr> <tr> <td> Street 808 West Grand Street, Apt 1R City Elizabeth State/Territory New Jersey Zip 07202 Country United States </td> </tr> </table>	Address	Street 808 West Grand Street, Apt 1R City Elizabeth State/Territory New Jersey Zip 07202 Country United States
Address			
Street 808 West Grand Street, Apt 1R City Elizabeth State/Territory New Jersey Zip 07202 Country United States			
Contact Phone Number	9084228569		

Applicant Education

BA/BS From	Kean University
Date of BA/BS	May 2017
JD/LLB From	Rutgers School of Law--Newark https://law.rutgers.edu/
Date of JD/LLB	May 20, 2022
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Rutgers Law School Intellectual Property Law Journal
Moot Court Experience	No

Bar Admission

Admission(s)	Other
Other Bar Admission(s)	N/A

Prior Judicial Experience

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	Yes

Specialized Work Experience

Professional Organization

Organizations	Just the Beginning Organization
---------------	---------------------------------

Recommenders

Kettle, John
jkettle@law.rutgers.edu
973-353-3257

Caposela, Hon. Ernest
ernestcaposela@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

EDUARDO SANCHEZ

808 West Grand Street, Apt 1R, Elizabeth, NJ 07202 | Phone: (908) 422-8569 | Email: sancedwa@icloud.com

June 6, 2023

The Hon. Juan R. Sanchez, U.S.D.J.
Chief Judge of the U.S. District Court for Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez,

I am a 2022 graduate of Rutgers Law School and write to apply for a 2024-2025 term clerkship in your chambers. Because of my work ethic and relevant legal experience, I am confident I would make a strong addition to your team.

Currently, I am a Judicial Law Clerk to the Honorable Ernest M. Caposela in the Superior Court of New Jersey. In my role with Judge Caposela, I assist with the full range of cases before the court, including Motions for Order to Show Cause, Complaints in Lieu of Prerogative Writs involving Appeals from Municipal Zoning Boards, and Condemnation cases. Before graduation, I completed a judicial internship with Judge Alberto Rivas, Superior Court of New Jersey, drafting legal memos and judicial orders for the Judge and Judicial Law Clerk on decisions for a variety of motions in the Judge's docket.

I am also well-qualified to clerk in your chambers because of my strong research, writing, analytical, and communication skills. Through my work, I regularly draw on the invaluable research and writing skills I honed as a Summer Law Clerk at the Dann Law Firm, an editor on the *Rutgers Law Computer and Technology Law Journal*, and as part of the Rutgers Law School Intellectual Property Law Clinic.

Over summer 2021, I was honored to be named a Hispanic National Bar Association/Microsoft Intellectual Property Law Institute Scholar. The IPLI program is a week-long immersion program where I received substantive instruction in intellectual property law and participated in legal writing workshops led by Judge Reyna of the U.S. Court of Appeals for the Federal Circuit.

These experiences and my relevant skills make me an ideal candidate for a position in your chambers and I would enjoy an opportunity to discuss my candidacy further. Enclosed for your review are my resume, law school and undergraduate transcripts, references, and writing sample(s). I am available to interview at your convenience. Thank you for your consideration.

Respectfully,



Edwardo Sanchez

EDUARDO SANCHEZ

808 West Grand Street, Apt 1R, Elizabeth, NJ 07202 | Phone: (908) 422-8569 | Email: sancedwa@icloud.com

EDUCATION

Rutgers Law School, Newark, NJ

Juris Doctor, May 2022

- Honors: 2021 HBA-NJ/Prudential Gold Scholarship
2021 HNBA/Microsoft Intellectual Property Law Institute Scholar
- Journal: Rutgers Law Computer and Technology Law Journal, *Managing Development Editor* (2021- 2022),
Associate Editor (2020-2021)
- Activities: Rutgers Law Minority Students Program
- Leadership: Association of Black Law Students, *Co-Vice President of Academic Affairs*
Metropolitan Latin American Law Student Association, *Vice President of Alumni Relations*
Hispanic National Bar Association Law Student Division, *Vice Chair of Programming & Membership*
National Latina/o Law Student Association, *Director of National Relations*

Kean University, Union, NJ

B.S. in Computer Science, B.A. in Political Science, May 2017

- Honors: Sidley Austin LLP Prelaw Scholarship
Dean's List
Epsilon Epsilon Omega Honor Society
- Volunteer: Seton Hall Law Pre-Legal Program, Hispanic National Bar Association-NY,
Hispanic Bar Association of New Jersey, and LatinoJustice Puerto Rican Legal
Defense and Education Fund

EXPERIENCE

Superior Court of New Jersey, Passaic Vicinage, Paterson, NJ

Law Clerk to the Honorable Ernest M. Caposela, A.J.S.C., August 2022 – present

- Prepare and draft legal opinions on a variety of legal issues before the court.
- Review complaints, motions, and pleadings to brief the Judge about upcoming matters.
- Conduct mediation for the Landlord-Tenant Court.

Superior Court of New Jersey, Middlesex Vicinage, Civil Division, New Brunswick, NJ

Judicial Intern to the Honorable Alberto Rivas, J.S.C., February 2022 – June 2022

- Drafted legal memos for the Judge and Judicial Law Clerk on decisions for a Motion to Compel Discovery, Motion to Dismiss, and Motion for Summary Judgment on various cases before the Civil Division.
- Drafted judicial orders on various motions filed through New Jersey E-Courts.

Rutgers Law School Intellectual Property Law Clinic, Newark, NJ

Clinical Law Student, August 2021 – May 2022

- Drafted transmittal letters to clients for Certificates of Registration, Statements of Use, and Intent to Use filings.
- Drafted opinion letters to clients based on results of trademark searches done on USPTO.gov and online sources.

DannLaw, Westwood, NJ

Summer Law Clerk, May 2020 – August 2020 & May 2021 – August 2021

- Conducted legal research on legal standards for Summary Judgment, Imposing Stay, New Jersey Consumer Fraud Act, New Jersey Home Owner Security Act, Ohio Real Estate Law, and Federal Rule of Civil Procedure Rule 23.
- Drafted pleadings, discovery, motions, and motion oppositions in New Jersey and Ohio State Courts, New Jersey, New York, and Ohio Federal Courts and the United States Bankruptcy Court.
- Drafted memorandums on the New Jersey Consumer Fraud Act and Ohio Real Estate Law to attorneys and Notice of Error letter briefs to loan servicers and banks under federal consumer protection laws.

LANGUAGE SKILLS

- Fluent in Spanish (native fluency)



Intellectual Property Law Clinic
Rutgers, The State University of New Jersey
Center for Law and Justice
123 Washington Street
Newark, NJ 07102

John R. Kettle III, Esq.
Director
jkettle@law.rutgers.edu
973-353-3257
Fax: 973-353-3397

May 30, 2023

Re: Edwardo Sanchez

Dear Your Honor,

I was asked by Edwardo Sanchez to prepare a letter of recommendation to support his candidacy for a clerkship with your court, and it pleases me to do so. By way of background, I have known Mr. Sanchez for approximately two and one-half years. He was a dedicated student in the classes that I taught and was an excellent Clinical Law Student in my Intellectual Property Law Clinic.

It is important for me to point out that Edwardo Sanchez's participation in class discussions was consistently of substantial value to the exchange between myself and his fellow law students. He was always prepared, knowledgeable and inquisitive. Mr. Sanchez organized his analyses well and demonstrated a keen ability to identify the important questions to ask. His level of contribution to class discussions, and with regard to the work of the Clinic, revealed his passion for the study of law and the great deal of thought he gives to the legal, business, and policy issues presented.

I am also pleased to mention that Mr. Sanchez was named a HNBA IP Scholar, and awarded a HBA-NJ/Prudential Gold Scholarship. Moreover, in addition to his law school studies, he worked with and served on various law school related associations and organizations, which includes his serving as an Associate Editor and subsequent Managing & Development Editor of the *Rutgers Computer & Technology Law Journal*. Outside the law school Mr. Sanchez worked as a paralegal and subsequently as a law clerk with the New Jersey based law firm DannLaw where he conducted research, drafted memoranda and pleadings, and provided other legal support for various litigation matters. The foregoing is indicative of his dedication, drive and commitment to learn as much about the law as possible, which should make him an ideal candidate for a clerkship with your court.

Letter of Recommendation
Re: Edwardo Sanchez

Page 2

In the short period of time that I have known and worked with Edwardo Sanchez, I am impressed with his research skills, attention to detail, work ethic, motivation and accomplishments. He is a pleasure to work with and is a hard worker with high moral and ethical standards who pursues excellence in his work. I have great admiration for what he has accomplished and how he sought to improve his law school performance and experience each semester. I am confident that he will become a valuable member of the profession. I highly recommend him for a clerkship with your court and welcome any questions you may have about him.

Very truly yours,

John R. Kettle III

JOHN R. KETTLE III
Clinical Professor of Law
Director, Rutgers Intellectual
Property Law Clinic
Judge John W. Bissell Scholar
University Senator

To Whom it May Concern,

I recommend Eduardo Sanchez for a position as a federal court law clerk. Eduardo served as my law clerk when I was an Assignment Judge in the Superior Court of New Jersey Passaic County. In that position I was responsible for managing 25 judges and 500 staff. In addition to my administrative duties I heard major civil cases that had an impact on the public, such as election fraud, public contract disputes, appeals from administrative decisions and public employment disputes.

Eduardo has an exceptional work ethic. He was never late on an assignment. He has an outstanding demeanor enabling him to effectively interact with judges, staff, attorneys and litigants. He exhibited superior organizational skills assisting me with many of my administrative responsibilities. He has researched and written drafts of major decisions rendered by this court.

I unconditionally recommend him.

Ernest Caposela

EDUARDO SANCHEZ

808 West Grand Street, Apt 1R, Elizabeth, NJ 07202 | Phone: (908) 422-8569 | Email:
sancedwa@icloud.com

WRITING SAMPLE

This is an excerpt of a judicial opinion I drafted as a Judicial Law Clerk to the Honorable Ernest M. Caposela, A.J.S.C., Superior Court of New Jersey, Passaic Vicinage in support of denying plaintiff's motion for order to show cause with injunctive relief under Crowe v. Di Gioia, 90 N.J. 126 (1982). Plaintiff brought this lawsuit against the Defendants because the Municipality Defendant was unfair in denying their Resolution to operate the business in the municipality. Also, the Plaintiff argues that they were entitled to operate their business as they were first in right on the property. To reduce its length, the excerpt includes only the analysis for whether all relevant factors weigh against granting the plaintiff injunctive relief.

While Judge Caposela has reviewed and edited my initial draft, I performed all of the research and this work was substantially drafted by me. I have received permission to use this excerpt as a writing sample.

DISCUSSION

I. Big Smoke Failed to Establish that it is Entitled to Preliminary Injunctive Relief Because Big Smoke did not satisfy the Crowe Factors

Here, Big Smoke is not entitled to preliminary injunctive relief because Big Smoke did not satisfy the required factors under Crowe v. Di Gioia.

A. Irreparable Harm

Big Smoke argues that it will suffer irreparable harm for the following reasons: (1) Big Smoke's Class 5 cannabis license application will be rejected by the NJCRC and will not obtain a Class 5 license for its location without the Resolution of Support from West Milford, (2) West Milford Towns may award Class 5 cannabis retailer municipal licenses to SoulFlora and other applicants if SoulFlora is allowed to rely on West Milford's Resolution of Support while litigation is pending, (3) their claims will be substantially impaired if SoulFlora receives a municipal license based on improper issuance of its zoning permit, (4) they will likely be precluded from the Township's licensing process under the West Milford Code if the Township awards the max amount of cannabis retailer licenses before resolving Big Smoke LLC's claims, and (5) no money damages are available to Big Smoke as the licensing process is analogous to the public bidding context, which is prohibited under NJ Statute.¹ However, these reasons are not enough to demonstrate irreparable harm.

Plaintiff Big Smoke has not shown that it has an inadequate remedy at law by clear and convincing evidence because Plaintiff admits that it has a remedy at law where the Court can either reverse the municipal action outright or vacate and remand for further proceedings through filing an action in lieu of prerogative writs. The harm being claimed is that Plaintiff will not be able to obtain a license from the NJCRC because it cannot obtain one without the Resolution of Local Support from

¹ See Plaintiff's Brief for Mtn. for Order to Show Cause, Pages 7 – 10.

the Township, but this harm will not necessarily be remedied even if Plaintiff is successful in this lawsuit. Plaintiff has not demonstrated that it invested anything more than other applicants for local support. Plaintiff will not suffer irreparable harm as the Plaintiff is not precluded from conceivably operating at a different location, and in compliance with the 2,500-foot buffer as required by local ordinance.

Plaintiff argues that it seeks injunctive relief to preserve the status quo. However, the status quo, at the time of this Motion and Complaint, are as follows: (1) West Milford already issued a Zoning Permit that reflects SoulFlora's name on or about October 22, 2021² & received their Resolution of Local Support to Soulflora³, (2) the Cannabis Regulatory Commission approved their Class 5 cannabis retail license⁴, (3) West Milford denied the Plaintiff's request for a Resolution of Local Support due to a violation of the distance ordinance⁵, and (4) SoulFlora's rights to operate a Class 5 cannabis retail facility are vested at this point as a final inspection of the business needs to be done within a year of receiving the final agency approval before being licensed.⁶

Based on these reasons, Plaintiff Big Smoke did not establish that it will suffer from irreparable harm without the preliminary injunction.

B. Big Smoke's Legal Rights Are Not Settled

Big Smoke states that their legal rights are settled because New Jersey permits entities with standing to challenge government action that is arbitrary, capricious, or unreasonable or not supported by credible evidence in the record. Moreover, Plaintiff argues that there was no reasonable basis upon which the Township denied Big Smoke's request for a Resolution of Support, which essentially

² See SoulFlora's Opp. For Mtn. for Order to Show Cause, Exhibit 2 ([Filed](#) Dec. 12, 2022).

³ See SoulFlora's Opp. For Mtn. for Order to Show Cause, Exhibit 1 ([Filed](#) Dec. 12, 2022).

⁴ See SoulFlora's Opp. For Mtn. for Order to Show Cause, Exhibit 3 ([Filed](#) Dec. 12, 2022).

⁵ Plaintiff's Complaint ¶¶ 26-29; see SoulFlora's Opp. For Mtn. for Order to Show Cause, Exhibit 1; see also Plaintiff's Complaint, Exhibits G – H; see also Plaintiff's Complaint, Exhibit I.

⁶ See SoulFlora's Opp. For Mtn. for Order to Show Cause, Exhibit 3 ([Filed](#) Dec. 12, 2022).

precluded Big Smoke from proceeding with the cannabis licensing process at both the State and local levels.

Under the West Milford Township Code, it states that:

Any member of the public, group or organization wishing to seek Council discussion or action on any item must submit a request in writing to the Office of the Township Clerk during regular business hours. The Clerk shall cause same to be provided to the Mayor, Council and Administrator when providing the agenda for the next regularly scheduled Council meeting. The Mayor and/or Administrator may cause such items to be placed on a future workshop agenda for discussion or a future regular meeting for action. Failure of the Mayor and/or Administrator to place such items on a future agenda shall be construed as a directive to forego the matter. Any Council member may, at the next meeting after receipt of such requests, seek consensus from a majority of the Council to have such matters placed on a future workshop agenda for discussion or a future regular meeting agenda for action. Failure any Council member to seek such consensus shall be construed as Council's directive to forego the matter.⁷

Plaintiff requested that a Resolution of Support be added to the Township Agenda on October 18, 2022 and renewed its Request on October 27, 2022.⁸ In response, West Milford denied their initial request and renewed request for Resolution in Support.⁹ The CREAMM Act grants a municipality certain regulatory authority over cannabis licenses.¹⁰ A municipality may enact ordinances or regulations, not in conflict with the provisions of CREAMM Act.¹¹ West Milford Ordinance 2022-015 Section 1 & West Milford Township Code states that there shall be a minimum distance of not less than 2,500 feet between licensed cannabis retail businesses.¹²

Here, West Milford was not “arbitrary, capricious, nor unreasonable” in denying Big Smoke’s Request for a Resolution in Support because another Resolution of Support had already been issued

⁷ West Milford Twp. Code § 42-5, Agenda, Paragraph B.

⁸ See Plaintiff’s Complaint, Exhibits G.

⁹ See Plaintiff’s Complaint ¶¶ 26-29; see also Plaintiff’s Complaint, Exhibit I.

¹⁰ See N.J.S.A. § 24:61-45.

¹¹ N.J.S.A. § 24:61-45(a).

¹² West Milford Twp. Code § 500-205, Measurement and Buffering, Paragraph A; West Milford Ordinance 2022-015.

to SoulFlora, which by operation precluded the Plaintiff's proposed location based on the "2,500-foot" buffer requirement as required by the Township's cannabis ordinance.¹³ The West Milford Cannabis Ordinance does not guarantee a Resolution of Support solely based on having a Zoning Permit. Also, the record does not support the claim that Township's "licensing process" for Class 5 cannabis retailers is somehow "arbitrary and capricious" as the Township strictly followed the requirements of its ordinances, in deciding to forego the Plaintiff's request for a Resolution of Support. As mentioned above, SoulFlora is at the stage where their rights to operate a Class 5 cannabis retail facility are vested as a final inspection by the NJCRC must be conducted before getting their Class 5 cannabis retailer license while Big Smoke was applying for a Class 5 cannabis license through the NJCRC.

Hence, Big Smoke did not establish that their legal rights were settled to grant a preliminary injunction.

C. Big Smoke Does Not Have Reasonable Probability of Success on the Ultimate Merits

Big Smoke argues that the facts are not in dispute and there is a probability of success on the ultimate merits of this case for the following reasons. First, there was no retail licensee within 2,500 feet of Big Smoke, and no retail licensee within 2,500 of SoulFlora, as neither entity was presently licensed within the meaning of the Buffer Ordinance as SoulFlora remains a license applicant under the applicable regulations. Second, Big Smoke received their Zoning Permit before West Milford passed the Buffer Ordinance and should not be subject to its provisions. Third, Big Smoke's Zoning Permit became effective more than a year before SoulFlora's Permit, thus, was first in time. Fourth, West Milford Township's decision to deny Big Smoke's request for Resolution of Support is

¹³ See SoulFlora's Opp. For Mtn. for Order to Show Cause, Exhibit 1 (Filed Dec. 12, 2022); see also Plaintiff's Complaint, Exhibit H.

inequitable because Big Smoke has spent a significant amount of money over the past year securing Township approvals and applying for the State cannabis license from the NJCRC. Fifth, West Milford Township is blocking Big Smoke from completing the state license application by refusing to offer a Resolution in Support.

Here, Plaintiff does not have a reasonable probability of success on the ultimate merits, hence, denying injunctive relief because (1) Plaintiff relies on the fact that Big Smoke's Zoning Permit became effective more than a year before SoulFlora's Permit, when SoulFlora received their conditional Zoning Permit on October 22nd, 2022,¹⁴ and (2) SoulFlora got their Resolution in Support a year before the Plaintiff requested such a document from West Milford.¹⁵ Therefore, Big Smoke did not satisfy the third factor to grant injunctive relief.

D. The Balance of Equities and the Public Interest Do Not Weigh in Favor of Big Smoke

Big Smoke argues that the balance of equities are in its favor because the absence of injunctive relief pending the entry of final judgment would allow SoulFlora or other cannabis retailer applicants to continue the permitting process thereby substantially impairing, if not destroying, the subject matter of this litigation, specifically, the Resolution of Support from West Milford.

However, the balance of equities is not in the Plaintiff's favor. The subject matter of this litigation are the ten (10) Class 5 cannabis retail licenses, not the Resolution of Support. Plaintiff can still get a Resolution of Support and, ultimately, a Class 5 cannabis retailer license from West Milford without preliminary injunctive relief. SoulFlora will suffer irreparable harm from Big Smoke's injunctive relief as their rights to operate a Class 5 adult-use cannabis dispensary are vested, whereas the Plaintiff's rights are not since they have not obtained such approvals and are preventing SoulFlora

¹⁴ See SoulFlora's Opp. For Mtn. for Order to Show Cause, Exhibit 2 ([Filed](#) Dec. 12, 2022); Plaintiff's Complaint, Exhibit D.

¹⁵ SoulFlora's Opp. For Mtn. for Order to Show Cause, Exhibit 1 ([Filed](#) Dec. 12, 2022).

from complying with its obligations outlined in the Final Agency Letter. Plaintiff's complaint would result in a severe hardship on the Township, which specifically "opted in" to allow local cannabis businesses—and even amended its ordinance to allow such businesses as a permitted use. West Milford's issuing of a Resolution of Support does not guarantee an applicant a license or an ability to ultimately operate in the Township.

Big Smoke also argues that the public interest favors them because the public has the right to expect that the Township's licensing process is objective, transparent, fair, and in accordance with the law. In addition, entities that receive a Resolution of Support from the Township and a license from the NJCRC will be selling various cannabis products to the general public and the process for selecting those businesses should be equitable. However, the public interest does not favor Big Smoke as West Milford Township considered allowing cannabis businesses to operate within the Township, and based on later concerns, to carefully consider amendments—but always subject to local control.

Based on these reasons, Big Smoke cannot receive preliminary injunctive relief as they did not establish the Crowe factors to allow such relief.

Applicant Details

First Name **Shane**
 Last Name **Sanderson**
 Citizenship Status **U. S. Citizen**
 Email Address ss4436@georgetown.edu

Address

Address
<p>Street 329 Elm St NW</p> <p>City Washington</p> <p>State/Territory District of Columbia</p> <p>Zip 20001</p>

Contact Phone Number **5733552979**

Applicant Education

BA/BS From **University of Missouri**
 Date of BA/BS **May 2017**
 JD/LLB From **Georgetown University Law Center**
https://www.nalplawschools.org/employer_profile?FormID=961
 Date of JD/LLB **June 7, 2023**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Georgetown Journal of Legal Ethics**
 Moot Court **No**
 Experience

Bar Admission**Prior Judicial Experience**

Judicial Internships/
 Externships **No**

Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

Recommenders

Axam, Tony
tony_axam@fd.org
Vázquez, Carlos
vazquez@georgetown.edu
Hopwood, Shon
srh90@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

329 Elm St. NW
Washington, DC 20001

June 9, 2023

The Honorable Juan R. Sanchez
James A. Byrne United States Courthouse
601 Market St., Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez,

I am a recent graduate of Georgetown Law writing to apply for a term clerkship beginning in 2024. Before law school, I worked as a newspaper reporter. While in law school I have assisted with public defense work, a *pro bono* civil rights case, and criminal record expungement. I would be honored to serve as your clerk.

My personal story is somewhat unusual. After high school I attended college briefly but quickly dropped out. I worked in the service sector for about five years. When I decided I wanted a different set of opportunities, I enrolled in community college. In the school library, I read an article that focused on racial disparities in capital sentence judicial overrides. I was appalled. I transferred to the University of Missouri to study under the article's author.

Once I began work as a journalist, I covered a series of criminal trials. Briefing in one case convinced my untrained eye that the trial court improperly allowed the government to present acquitted conduct. The state supreme court held for the defense and reversed the conviction. I then realized I would need to go to law school to indulge my intellectual and professional interests. I now know I made the right decision.

I would greatly appreciate the opportunity to assist in the work of your chambers. My experiences as a low-wage worker and community college student have taught me resilience, persistence, and fortitude. My professional background as a journalist has taught me the importance of care and precision when writing for the public. And my work during law school on criminal appeals, civil rights plaintiff litigation, and criminal record expungement has taught me how the technical challenges of legal work are linked to real differences in people's lives.

I have also provided a resume, a copy of my academic transcript, a writing sample, and letters of recommendation from Assistant Federal Public Defender Tony Axiom, Professor Shon Hopwood, and Professor Carlos Vázquez. Thank you for your time and consideration. Please do not hesitate to contact me for any other information in support of my candidacy at 573.355.2979 or ss4436@georgetown.edu.

Best regards,



Shane Sanderson

SHANE SANDERSON

329 Elm St. NW, Washington, DC 20001 • (573) 355-2979 • ss4436@georgetown.edu

EDUCATION**GEORGETOWN UNIVERSITY LAW CENTER****Washington, DC***Juris Doctor*

June 2023

GPA: 3.69/4.00

Activities: *Georgetown Journal of Legal Ethics*, Executive & Submissions Editor; Christian Legal Aid of DC, volunteer.

Honors: Dean's list (1L); Pro Bono Pledge honoree; Merit scholarship.

Publication: Shane Sanderson, Note, *Drawing a Portrait of Confidence: One Resolution to Legitimate Voter Concerns in the Shadow of Illegitimate Violence*, 35 GEO. J. LEGAL ETHICS 1117 (2022).**UNIVERSITY OF MISSOURI****Columbia, MO***Bachelor of Journalism; Emphasis in Data Journalism for Print and Digital News*

May 2017

Honors: Sam Bronstein Scholarship; Jeanne & David Rees Scholarship; Raymond J. Ross Scholarship.

COLLEGE OF THE ALBEMARLE**Manteo, NC***Associate in Arts*

Dec. 2014

EXPERIENCE**DECHERT****Philadelphia, PA***Incoming Litigation Associate*

Nov. 2023 (anticipated)

Summer Associate

May – July 2024

- In federal trial of pro bono matter, *inter alia*: summarized potential cross-examination faced by client on the basis of his first-day testimony and proposed modes of rehabilitation; researched case law for potential *Batson* challenge; drafted portions of motion *in limine*; and drafted and delivered opposing counsel moot opening statement and closing argument.
- Wrote internal memoranda for circulation to litigation team on product liability matter set for trial in August. Redrafted memoranda for presentation to client advising trial strategy following opposing counsel's release of relevant discovery.
- Drafted questions used in deposition of adverse expert witness expected to testify regarding remedies.

FEDERAL PUBLIC DEFENDER**Washington, DC***Appellate Intern*

Sept. 2021 – April 2022

- Wrote first draft of successful motion for relief in District Court on Sixth Amendment grounds resulting in the court's identification of error in jury selection process and corresponding modification of procedures for the District.
- Drafted pre-trial motions, portions of sentencing memorandum, and portions of habeas corpus petitions to District Court, as well as portions of certiorari petition filed with U.S. Supreme Court.
- Investigated novel questions of law and drafted summaries of relevant persuasive authorities for reference in client consultation and drafting of appellate briefs, habeas corpus petitions, and probation revocation arguments.
- Conducted preliminary statistical analysis of jury panel demographics to prepare litigation of Sixth Amendment issue.

CALIFORNIA APPELLATE PROJECT**San Francisco, CA***Habeas Intern*

June – Aug. 2021

- Reviewed trial record, client communications, newly developed evidence, relevant scientific literature, and appellate attorney documentation to identify potential issues for state habeas corpus petition in death penalty case.

CASPER STAR-TRIBUNE**Casper, WY***Criminal Justice Reporter*

Aug. 2017 – July 2020

- Researched and reported articles totaling more than 5,000 words, drawing on thousands of pages of court and administrative documents and hours of in-person interviews.
- Independently pitched and implemented a redesign of the paper's criminal justice coverage, reorienting the section toward in-depth narrative, investigative and accountability journalism.
- Honored with the Wyoming Press Association's first place award in general news and the Associated Press Sports Editors' national investigative prize, ranking alongside contestants from ESPN.com, USA Today and Yahoo Sports.

KANSAS CITY STAR**Kansas City, MO***News Reporting Intern*

June – Aug. 2017

COLUMBIA MISSOURIAN**Columbia, MO***Assistant City Editor*

Dec. 2016 – May 2017

Public Safety Reporter

Jan. – Dec. 2016

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Shane Sanderson
GUID: 817740569

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	22	Civil Procedure	4.00	A	16.00	
			Aderson Francois				
LAWJ	002	22	Contracts	4.00	A-	14.68	
			Anna Gelpen				
LAWJ	005	21	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			Erin Carroll				
LAWJ	008	21	Torts	4.00	B+	13.32	
			Paul Rothstein				
Spring 2021							
LAWJ	003	22	Criminal Justice	4.00	A	16.00	
			Shon Hopwood				
LAWJ	004	22	Constitutional Law I: The Federal System	3.00	B+	9.99	
			Paul Smith				
LAWJ	005	21	Legal Practice: Writing and Analysis	4.00	B+	13.32	
			Erin Carroll				
LAWJ	007	92	Property	4.00	A-	14.68	
			Neel Sukhatme				
LAWJ	1326	50	Legislation and Regulation	3.00	A-	11.01	
			William Buzbee				
Dean's List 2020-2021							
Fall 2021							
LAWJ	126	07	Criminal Law	3.00	B+	9.99	
			John Hasnas				
LAWJ	1491	113	~Seminar	1.00	A-	3.67	
			Adrianne Clarke				
LAWJ	1491	115	~Fieldwork 3cr	3.00	P	0.00	
			Adrianne Clarke				
LAWJ	1491	20	Externship I Seminar (J.D. Externship Program)		NG		
			Adrianne Clarke				
LAWJ	165	09	Evidence	4.00	B+	13.32	
			Mushtaq Gunja				
LAWJ	1656	08	Technology and Election Integrity Seminar	2.00	A	8.00	
			Matt Blaze				
Transcript Totals							
				EHrs	QHrs	QPts	GPA
Current				13.00	10.00	34.98	3.50
Cumulative				43.00	40.00	143.98	3.60

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	1098	05	Complex Litigation	4.00	B+	13.32	
			Maria Glover				
LAWJ	1492	110	~Seminar	1.00	A-	3.67	
			Alexander White				
LAWJ	1492	112	~Fieldwork 3cr	3.00	P	0.00	
			Alexander White				
LAWJ	1492	39	Externship II Seminar (J.D. Externship Program)		NG		
			Alexander White				
LAWJ	1712	05	Advanced Evidence Seminar	3.00	A	12.00	
			Michael Pardo				
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	
			Robin Lenhardt				
Fall 2022							
LAWJ	1655	05	Criminal Justice Reform Seminar	3.00	A	12.00	
			Shon Hopwood				
LAWJ	178	05	Federal Courts and the Federal System	4.00	A	16.00	
			Carlos Vazquez				
LAWJ	351	05	Trial Practice	2.00	A-	7.34	
			Murad Hussain				
LAWJ	361	03	Professional Responsibility	2.00	A-	7.34	
			Stuart Teicher				
LAWJ	394	05	Jury Trials in America: Understanding and Practicing Before a Pure Form Democracy	2.00	A	8.00	
			Gregory Mize				
Spring 2023							
LAWJ	1713	05	Law & Neuroscience Seminar	2.00	A-	7.34	
LAWJ	1752	05	Introduction to Alternative Dispute Resolution	3.00	A-	11.01	
LAWJ	1780	08	Criminal Procedure and the Roberts Court Seminar	2.00	A	8.00	
LAWJ	268	05	Remedies in Business Litigation	3.00	A	12.00	
LAWJ	455	01	Federal White Collar Crime	4.00	A-	14.68	
Transcript Totals							
				EHrs	QHrs	QPts	GPA
Current				14.00	14.00	53.03	3.79
Annual				27.00	27.00	103.71	3.84
Cumulative				85.00	79.00	291.36	3.69

-----End of Juris Doctor Record-----

**FEDERAL PUBLIC DEFENDER
DISTRICT OF COLUMBIA
SUITE 550
625 INDIANA AVENUE, N.W.
WASHINGTON, D.C. 20004**

A.J. KRAMER
Federal Public Defender

TONY AXAM, JR.
Assistant Federal Public Defender

Telephone (202) 208-7500
FAX (202) 208-7515
tony_axam@fd.org

May 5, 2022

Dear Judge,

I am writing to provide my highest recommendation for Shane Sanderson who worked in my office as a legal intern over the past school year. He is intelligent, hardworking, and deeply motivated by the promise of justice. I have no doubt that he will make an excellent law clerk, and eventually, an outstanding attorney.

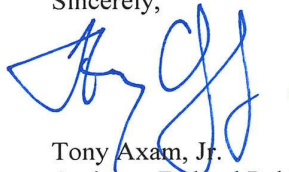
Shane came to the Office of the Federal Public Defender in the early fall of 2021 and immediately became a sought-after intern amongst the attorneys. His work with me involved research for cases on appeal in the D.C. Circuit. Obviously, his time as a reporter served him well as he was able to return assignments to me quickly with appropriate brevity and depth of analysis. He was the rare law student capable of understanding the broader implications of legal issues while successfully articulating their importance in the case immediately before the court.

I appreciated that Shane listened carefully and had the ability to understand the procedural and substantive doctrines that guide our work. He was able to accurately describe circuit splits for certiorari petitions and assist with evaluating issues of attorney ineffectiveness in post-conviction proceedings. When providing him assignments, I sometimes thought they were beyond the reach of a second-year law student. He repeatedly proved me wrong.

This spring, Shane assisted me with novel a Sixth Amendment jury cross-section challenge. Thanks in no small part to his extensive record review and legal research, our office inspired modifications to the District Court's jury selection plan. I like to think this effort will help ensure greater realization of our clients' rights to juries made up of fair cross-sections of the community.

I am pleased that I had the chance to supervise Shane and to get to know him personally. I look forward to watching him develop as a lawyer. Please contact me directly if you would like to further discuss my impressions of him.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Tony Axam, Jr.', with a stylized flourish at the end.

Tony Axam, Jr.
Assistant Federal Public Defender

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in support of Shane Sanderson's application to be your law clerk. Shane was a student in my Federal Courts and the Federal System class in fall of 2022. This is a notoriously difficult course, and it is generally taken by the top students at Georgetown, including all of those who plan to apply for a judicial clerkship. Even in this company, Shane was a standout student. I generally assign a panel of students to be "on call" for each class. Shane always gave on point and insightful answers when I called on him. But, more importantly, he went above and beyond, making valuable contributions to class discussions even when he was not on call. It was clear from his class participation that he had mastered the difficult, often abstruse doctrines in this field. He also often stayed after class to continue discussing the Federal Courts issues we had covered in class. These conversations, as well as conversations during my office hours, showed that, in addition to being very bright and well-spoken, Shane is intellectually curious and sincerely interested in the issues on which he would be working as your clerk.

In light of his class performance, I was not surprised, after grading the exams blindly, to find that he had written one of the top-scoring exams. The exam I gave that year was, in retrospect, an extremely difficult one. Most students missed a lot of the main issues. Shane's exam was exceptional in that he caught all of the major issues and examined them succinctly and insightfully. The exam was well-written, well-organized, and well analyzed, and it confirmed his mastery of the subject matter of the course. I gave him a well-deserved A in the course.

During our conversations after class and during office hours, I also found him to be a delightful person. I am confident he would get along well with you and with his peers. He had a pre-law school career in journalism covering legal matters, which prepared him well for law school. Shane also conveys a higher degree of maturity than the average law student.

In sum, I recommend Shane to you enthusiastically. I have no doubt that he would make an excellent law clerk.

Please do not hesitate to contact me if you would like to discuss Shane's qualifications further.

Sincerely yours,

Carlos M. Vazquez

Carlos Vzquez - vazquez@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter with enthusiastic support for Shane Sanderson's application for a clerkship in your chambers. I have come to know Shane through teaching him in my Criminal Justice course, my Criminal Justice Reform seminar at Georgetown University Law Center, and in our office-hours discussions.

Shane was among the strongest of my first-year Criminal Justice students in spring 2021 (our criminal justice class is essentially a criminal procedure class involving the Fourth, Fifth, and Sixth Amendments). Shane has a strong work ethic, bright intellect, and dedication to the cause of justice that will serve our legal system well in the years to come.

As a student, Shane was consistently fully prepared for my lectures. His cold-call responses consistently indicated a willingness to grapple with the material, the significance of its application, and the policy implications arising from the readings. His moral compass clearly informed our classroom discussion, and he showed an ability to advocate tenaciously on that basis while remaining thoughtful and respectful of his classmates and the teaching environment. I was deeply impressed by his ability to neatly arrange facts and distinguish doctrine in response to my classroom hypotheticals. I was therefore entirely unsurprised that Shane wrote one of the strongest papers I graded that spring.

This past fall, Shane attended my Criminal Justice Reform seminar, where he was asked to prepare a piece of legal scholarship. He was always thorough and engaging in class. In one class, former U.S. District Court Judge Mark Bennett was a guest lecturer, and Shane asked whether reversals from the circuit court ever went into his decisions on the bench, and Judge Bennett responded by saying, "that was the best question I have ever been asked," and then he proceeded to answer Shane's question in detail for the next ten minutes.

Shane's character in the classroom is due in no small part to his background. For years following high school, he worked in food service, coffeeshops and restaurant kitchens. When he returned to school, he studied journalism and covered criminal justice at a daily newspaper in Wyoming. His willingness to work hard and his attitude of service should be partially attributable to his prior experience.

It is in journalism that Shane developed the deep interest in the law that he demonstrated in my class. He also began developing an understanding of the real-world implications of legal work. While working in news he published multiple articles detailing instances of police use of force and investigative techniques after which agencies terminated employment of the officers involved. I think this background will equip him to help you in navigating the difficult and weighty questions posed to members of the judiciary.

Finally, Shane prepared an excellent paper this fall in which he argued that people with felony convictions should be allowed to sit on civil and criminal matters that arise from the prison setting. I think he is the first to write on this novel idea, and his paper was able to break complex ideas in easy-to-read paragraphs. Again, I think his journalism pedigree would be an asset to your chambers.

Shane is also a delight to be around. I am confident that you and your chamber would enjoy working with him and that he will be an excellent clerk. If you have any further questions that I can answer about Shane, please do not hesitate to ask.

Sincerely,

Shon Hopwood

Shon Hopwood - srh90@georgetown.edu

SHANE SANDERSON

329 Elm St. NW, Washington, DC 20001 • (573) 355-2979 • ss4436@georgetown.edu

WRITING SAMPLE

The attached writing sample is based on a series of research assignments I completed in Fall 2021 as an intern with the Federal Public Defender for D.C. After submitting those assignments and discussing their significance with my supervisor, Tony Axam, I condensed and rewrote my findings while providing additional analysis. Mr. Axam has approved submission of this writing sample. At his direction, I have removed the client's name throughout. All editing of this written work has been my own.

Shane Sanderson

MEMORANDUM**QUESTION PRESENTED**

Whether the courts of appeals have determined the appropriate *method of inquiry* into claims arising from allegations of juror exposure to extraneous information and whether any circuit split has percolated sufficiently to be granted review by the Supreme Court.

BRIEF ANSWER

Probably no. In circumstances involving claims of juror exposure to extraneous information, the circuit courts have largely focused their analyses on non-methodological issues that remain without intra-circuit harmony. Although the appropriate method of inquiry often follows those issues, the more apparent fissures in case law are pertain to the evidentiary burdens triggering and carrying hearings on juror exposure. The circuits therefore are still refining and examining their analyses of the lower courts' methods of inquiry.

The seminal line of Supreme Court cases pertaining to jury taint hearings proceed from *Remmer v. United States*, 347 U.S. 227 (1954), which established – as a feature of due process – defense access to a hearing in which the court determines the circumstances of the contact, the impact upon the juror and whether or not prejudice occurred. *Id.* at 230. The Court has further developed its jurisprudence regarding the presumption of such a hearing and the evidentiary burden. *See Smith v. Phillips*, 455 U.S. 209, 215 (1982), *United States v. Olano*, 507 U.S. 725, 739 (1993). Disagreement about precise meaning of these developments has resulted in a circuit split on the existence of such hearings and the conditions necessary to convene a hearing.

At least six circuits infer a rebuttable presumption of prejudice whenever a jury is exposed to external information in contravention of a District Court's instructions. *United States*

v. Lawson, 677 F.3d 629 (4th Cir. 2012) (describing the jurisprudential split). At least four other circuits have read *Smith* and *Olano* to either narrow or reject use of the rebuttable presumption. *Id.* The Court has not yet resolved the decades-long split.

Behind the aforementioned split, though, follows a less-developed issue. If a *Remmer* hearing is in fact held, what procedures must a district court follow in order to investigate the allegation of juror exposure? Here, the circuits are even more widely divergent. The courts of appeals that have looked to define procedural standards can be divided roughly into three categories corresponding to the extent of discretion retained by the relevant trial courts.

The D.C. Circuit is among the first group, which largely respects the district courts' discretion on the method of investigation at a *Remmer* or *Remmer*-like hearing. These circuits' enumerated factors for the trial courts' use are not binding and only provided as guidance. The second group tends to define general categories of inquiry to be undertaken by district courts. So long as the trial courts within these circuits examine general types of evidence in their investigation, then the district courts will have conducted full investigations. The third group is the most circumspect of its lower courts' determinations. In these circuits, certain factors must be considered. The scales to be used by the trial tribunal are precisely calibrated as to each factor; if a trial court does not appropriately weigh an enumerated factor, its decision may be overturned.

These groupings are somewhat loose. As noted above, the circuits have a broad divergence in their practices, and this issue is rarely confronted head on by the courts of appeal. It would thus appear that this issue – although very relevant to the client's circumstances – is unlikely to be selected on a petition for certiorari. The issue appears still to be percolating. However, because the issue is of central significance to the client's case, it would be prudent to provide such petition to the Supreme Court.

STATEMENT OF FACTS

CLIENT was convicted in D.C. District Court of a single federal drug offense: conspiracy to distribute crack cocaine. He additionally was convicted of D.C. Code offenses to include assault with intent to murder, murder, and possession of a firearm during a crime of violence. He is serving 145 years to life in prison. The D.C. Circuit affirmed CLIENT's convictions and remanded for the purpose of determining whether the District Court would have imposed a different sentence under post-*Booker* sentencing standards. *CIRCUIT COURT CITATION*. It determined it would not and the court of appeals then affirmed.

The issue of interest on certiorari arose about a year following trial when counsel for CO-DEFENDANT #1 was approached at the dry cleaner by an alternate juror. *DISTRICT COURT CITATION*. The alternate juror, who had been released before deliberation began, stated that another juror – Juror 7 – had an inappropriate relationship with the Deputy Marshal in charge of the case. *Id.* Counsel for another co-defendant had a chance encounter with the same alternate juror shortly after. *Id.* at 11. The alternate juror stated the same and stated that the Deputy Marshal had also told her that a co-defendant had entered a (withdrawn) guilty plea. *Id.*

The district court held two evidentiary hearings. *Id.* At the first, the court took testimony of the alternate juror and Juror 7. *Id.* The alternate juror stated that when the Deputy Marshal took the panel to the bank on two occasions, Juror 7 remained in the van with the Deputy Marshal. *Id.*, at 12. She also stated that other jurors “saw other things.” *Id.* The alternate juror also testified that after she was discharged, she told the Deputy Marshal that she did not think the government had proven its case. *Id.* He stated: “Do you know that [CO-DEFENDANT #2] admitted he did that?” *Id.* The alternate juror stated that she had a conversation with a different deliberating juror – Juror 2269 – and stated while deliberations were ongoing that CO-